Litigation & Arbitration Group

Milbank

Client Alert

The Arbitration Act Turns 25: Reflections On Its Role and Possible Areas for Reform

31 January 2022

Contacts

Tom Canning
Partner
+44 20.7615.3047
tcanning@milbank.com

Mark Padley
Associate
+44 20.7615.3121
mpadley@milbank.com

Vasiliki Katsarou
Associate
+44 20.7615.3282
vkatsarou@milbank.com

Isabella Heber
Associate
+44 20.7615.3808
iheber@milbank.com

2021 marked the 25th anniversary of the coming into force of the English Arbitration Act (the Arbitration Act 1996, or "the Act"). The Act has been pivotal to the development of arbitral jurisprudence domestically and internationally, to the growth of international arbitration as a preferred method of dispute resolution, and to the overwhelming popularity of London as a seat of arbitration.

25 years later, and perhaps in part due to the emergence of other prominent seats (particularly in Asia), the Law Commission has now decided to review the Act with the aim of maintaining "*the attractiveness of England and Wales as a "destination" for dispute resolution and the pre-eminence of English law as a choice of law*".[1]

In this article, we consider:

(i) the growth of international arbitration and the backdrop to the Law Commission's review;

(ii) the areas which may be subject to change as part of the review; and

(iii) the broader, public policy issues associated with the transparency of arbitration and the development of the English common law.

The Act and London's place in the International Arbitration Community

The Act provides the legislative framework and backbone for the conduct of arbitrations seated in, and the enforcement of awards in, England and Wales.

[1] Law Commission, 30 November 2021 statement, https://www.lawcom.gov.uk/law-commission-to-review-the-arbitration-act-1996/.

The Act has helped London become one of the most popular seats for international arbitration and the number of arbitrations seated in London continues to grow.[2] London is, however, not alone in seeing this level of growth. According to a 2021 survey, Asian disputes hubs in particular have enjoyed a surge in popularity.[3] Last year, Singapore shared top spot with London for the first time in the survey's history, with 54% of respondents identifying it as one of their top five choices (up from 39% in 2018), while 50% of those surveyed ranked Hong Kong in their top five preferences (up from 28% in 2018). A clear pattern has therefore emerged, with Asian seats perhaps becoming more popular than their continental European counterparts, and as popular as London.

Against this backdrop and with a number of jurisdictions in recent years having modernised their arbitration legislation,[4] the Law Commission has now outlined a number of potential areas for review:

- the introduction of an express power for tribunals to implement a summary judgment-style procedure;
- a power for tribunals to strike out unmeritorious claims;
- the introduction of potential remedies for delays in the arbitral process;
- the use of electronic service of documents, electronic arbitration awards, and virtual hearings; and
- appeals on points of law.

Potential Areas for Review

Summary judgment and strike-out

One often-heard criticism of Arbitration is the inability to strike out unmeritorious claims at a very early stage of the proceedings, or for straightforward matters (such as debt claims) to be dealt with on a summary basis. This is an area which appears ripe for review.

It is important to note that the Act does already provide arbitrators with an *implicit* power to use expedited and summary procedures,[5] and certain institutional rules already address this issue by adopting summary judgment style processes. In 2016, the Singapore International Arbitration Centre (SIAC) introduced Rule 29 to the SIAC Arbitration Rules, which provides that a party may apply to the tribunal for the early dismissal of a claim or defence on the grounds that it is manifestly without legal merit, or manifestly outside the jurisdiction of the tribunal. In 2020, the LCIA similarly updated its Rules to include an express provision which allows a tribunal, by way of 'early determination' (on application by a party or on its own initiative) to decide that any "*claim, defence, counterclaim, cross-claim, defence to counterclaim or defence to cross-claim is manifestly outside the jurisdiction of the Arbitral Tribunal, or is inadmissible or manifestly without merit*" (Article 22.1 of the LCIA Rules).[6]

Perhaps, however, by giving such processes an express statutory footing in the Act, arbitrators may be encouraged to use them more often. And the wider use of these strike out powers is likely to add to the attractiveness of London as a seat, especially for finance parties / lenders who have, until

2 London ranked as one of the top 5 seats of choice for international arbitration in 2010; 2015; 2018 and 2021, according to international arbitration surveys conducted by Queen Mary University of London ("**QMUL**"). It was also the most frequently chosen seat for cases referred to the LCIA in 2019 and 2020 (see LCIA 2019 Annual Casework Report; and LCIA 2020 Annual Casework Report).

3 2021 QMUL International Arbitration Survey.

4 Including, by way of illustration, Singapore, Hong Kong, the Netherlands, Russia and Sweden.

5 Section 34 allows the tribunal to decide "*all procedural and evidential matters*" including, among other things "*whether and to what extent there should be oral or written evidence or submissions*".

6 See our previous client alert here for further information on the updated LCIA Rules.

relatively recently, been less inclined to favour arbitration over litigation precisely because the arbitral process is less predisposed to summary disposal of claims.

Remedies for delays

Users of international arbitration have increasingly started to call for clearer and more robust remedies for delays in the arbitration process, whether caused by the parties to the proceedings or by the tribunal.

With regard to delays caused by *parties*, section 41(5) of the Act does permit the tribunal to make 'peremptory orders'[7] where a party fails to comply with an order or direction of the tribunal. However, these orders are something of a nuclear option for controlling delay and are, for that reason perhaps, rarely seen in practice. Setting out more specific and more readily used remedies for deliberate delay tactics by parties would likely increase the prominence of England and Wales as a 'business friendly' and efficient seat of arbitration.

To address procedural delays caused by *tribunals*, stakeholders have suggested more transparency on an institutional level as to arbitrators' availability and the average time taken to render awards. On a statutory level, there is also room for clarification on the remedies available for such delays. Although section 33(1)(b) of the Act establishes a tribunal's general duty to avoid "*unnecessary delay*", there is little to no recourse to challenge the validity of an award on these grounds, unless, perhaps, a party can prove that the tribunal's delay in delivering the award has caused a "*substantial injustice*" under section 68(2) of the Act.[8]

Challenging awards and the role of the courts

Of the major international arbitral seats, England and Wales is a relative outlier in that there is an opt-out right to appeal an arbitral award on a point of law (section 69 of the Act). Awards are also very rarely overturned on this ground - between 2015 and 2019, only 7 out of 288 such applications were successful.[9] Reducing the high threshold for challenging an arbitral award under section 69 would, however, be a double-edged sword: on the one hand, it might be seen as increasing the overall efficacy of English-seated awards, but, on the other, it could be viewed as diluting one of the most important facets of arbitration: finality.

Section 44 of the Act, which sets out the court's powers to issue orders in support of the arbitral process (including by granting interim injunctions or assisting with the preservation and taking of evidence), could be clarified to make it clear as to whether or not that power extends to the making of orders against third parties (a matter that has not been finally settled by the relevant case law).[10]

---

7 Section 41(5) of the Act provides that, if a party fails to comply with any order or directions of the tribunal without showing sufficient cause, the tribunal may make a peremptory order to the same effect, which prescribes a specific deadline for compliance. If a party fails to comply with a peremptory order, then the tribunal may *(inter alia)*: draw adverse inferences from the act of non-compliance; proceed to an award on the basis of the materials available (this could result in the non-compliant party losing its right to a hearing); make an order for costs incurred in consequence of the non-compliance; or apply to the court to enforce the order (see s.41(7) and s.42 of the Act).

8 See, for example, the decision of Flaux J in *BV Scheepswerf Damen Gorinchen v The Marine Institute* [2015] EWHC 1810 (Comm), in which delay in producing an arbitral award was not considered sufficient grounds for a challenge to the award under s.68 of the Act.

9 The English Commercial Court Users' Group Meeting Report 2019.

10 While some judges have taken the view that, if section 44 was intended to extend to third parties, then clear wording would be included to this effect (see the judgment of Males J in *Cruz City v Unitech* [2014] EWHC 3704 (Comm)), others have held that certain of the powers under the section can be applied to third parties: See *A and B v C, D and E* [2020] EWCA Civ 409 in which the Court of Appeal held that section 44(2)(a) does give the power to order the taking of evidence from a non-party – but left open the question of whether all orders under section 44(2) can be made against non-parties.

In addition, section 44(5) of the Act allows the court to take steps in support of arbitral proceedings "*only if or to the extent that the arbitral tribunal and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively*". Most major arbitral institutions have now introduced provisions for the appointment of emergency arbitrators – a concept which did not exist when the Act was drafted. This has led to some confusion over how section 44(5) of the Act should interact with emergency arbitrator provisions and whether relief from the court can still be sought when emergency arbitration is available.[11] Statutory clarification would therefore be helpful.

Confidentiality, transparency and the development of the English common law

The confidentiality of arbitral proceedings is often anecdotally cited as one of the key attractions of arbitration (although it is worth noting that other features of arbitration, such as enforceability of awards and avoiding specific legal systems, rank higher in the survey data).[12]

Somewhat surprisingly to clients who are not familiar with the arbitration process, confidentiality is not, however, provided for in the Act. Instead, the duty of confidentiality is either implied into arbitration agreements and proceedings (including the award ultimately rendered by the tribunal) as a matter of English common law,[13] or is expressly incorporated via the arbitration rules of the major institutions (e.g. LCIA and ICC).

The increased use of arbitration and the propensity for the proceedings to be confidential through the incorporation of institutional rules has given rise to some notable criticisms, including the following:

- confidentiality allows parties to keep their disputes private, even when there might be a significant element of public interest (such as, by way of illustration, ESG-related cases);
- it is more difficult to scrutinise the performance and decisions of arbitrators where proceedings are in private, making it more challenging for parties to make an informed decision when choosing arbitrators; and
- if arbitral awards are only made public when challenged, there will likely be detrimental effects on the development of the English common law (which relies on decided case law), particularly given that the sectors which regularly default to arbitration are the same sectors which have historically shaped the English common law the most (e.g. insurance and shipping).

One line of argument has therefore emerged to the effect that the Act could be reformed to introduce greater transparency into arbitration proceedings. This might be achieved, it has been argued, by re-introducing a greater role for the courts in determining points of law or appeals. While this has

11 In *Gerald Metals v Timis* [2016] EWHC 2327 (Ch), the court rejected an application for injunctive relief on the grounds that the applicant had the ability to obtain such relief under the emergency arbitrator provisions provided under the 2014 LCIA Rules and that the matter was not sufficiently urgent that the Court should step in to exercise its powers under s.44 of the Act. See also our previous client alert here in relation to the new LCIA Rules and their interplay with s.44 of the Act. While the Rules have been amended to make it clear that parties can apply to the courts for interim relief "[n]*otwithstanding Article 9B*" and "*that the Arbitral Tribunal would have power to order* [such interim relief] *under Article 25.1*", it remains to be seen how this will interact with the English courts' powers under s.44 of the Act in circumstances where the tribunal (and/or LCIA Court) has not only the power but also sufficient time to grant appropriate relief.

12 "Confidentiality and privacy" were voted the fifth most valuable characteristics of international arbitration in the 2015 and 2018 QMUL surveys. The survey respondent groups consisted of (among others) academics, arbitral institutions (staff), arbitrators, "arbitrator and counsel in equal proportion", expert witnesses, in-house counsel and private practitioners. Respondents from every continent were interviewed.

13 The 1989 Report by the Departmental Advisory Committee on Arbitration Law (the DAC Report) makes it clear that the omission of an express confidentiality provision was deliberate when the Act was drafted. The drafters found it difficult to give an accurate exposition of the principle of confidentiality in the abstract and it was decided that this would be better left to the common law, on the basis that the rules could be developed by the English courts on a pragmatic case-by-case basis.

attraction, it does obviously risk undermining one of the key attractions of arbitration: minimal Court interference.[14] In addition, the Act already encourages cooperation between the courts and tribunals via section 45, which allows a court to determine a question of law in arbitration proceedings upon (a) an application by both parties by agreement; or (b) an application by one party with the permission of the arbitral tribunal. However, this section is seldom used.[15]

A better approach to increasing the body of decided case law might be to seek to build on the work already undertaken by arbitral institutions in publishing anonymised decisions and awards. The ICC, for example, grants full public access to anonymised versions of its arbitral awards via Jus Mundi (unless the parties object).

Conclusion

It is submitted that the Law Commission's review of the Act is both important and timely in terms of building on England and Wales's unprecedented success as a seat of arbitration over the past 25 years. There will, however, need to be a careful balance struck between further increasing London's prominence through innovation, and the old adage of 'if it ain't broke, don't fix it'.

Global Litigation Contacts

London | 100 Liverpool Street, London EC2M 2AT

Tom Canning	tcanning@milbank.com	+44 20.7615.3047
William Charles	wcharles@milbank.com	+44 20.7615.3076
Julian Stait	jstait@milbank.com	+44 20.7615.3005
Mona Vaswani	mvaswani@milbank.com	+44 20.7615.3002

New York | 55 Hudson Yards, New York, NY 10001-2163

George S. Canellos, *Global Head of Litigation*	gcanellos@milbank.com	+1 212.530.5792
Daniel Perry, *Practice Group Leader*	dperry@milbank.com	+1 212.530.5083
Antonia M. Apps	aapps@milbank.com	+1 212.530.5357
Thomas A. Arena	tarena@milbank.com	+1 212.530.5828
James G. Cavoli	jcavoli@milbank.com	+1 212.530.5172
Scott A. Edelman, *Firm Chairman*	sedelman@milbank.com	+1 212.530.5149
Adam Fee	afee@milbank.com	+1 212.530.5101
Christopher J. Gaspar	cgaspar@milbank.com	+1 212.530.5019
David R. Gelfand	dgelfand@milbank.com	+1 212.530.5520
Robert C. Hora	rhora@milbank.com	+1 212.530.5170
Alexander Lees	alees@milbank.com	+1 212.530.5161
Grant Mainland	gmainland@milbank.com	+1 212.530.5251
Atara Miller	amiller@milbank.com	+1 212.530.5421
Sean M. Murphy	smurphy@milbank.com	+1 212.530.5688
Tawfiq S. Rangwala	trangwala@milbank.com	+1 212.530.5587

14 A court is only permitted to intervene in arbitration proceedings to the extent expressly permitted by the Act (see section 1(c) of the Act) and as a general principle, the court will only intervene when it is satisfied that the applicant has exhausted any available arbitral process.

15 By March 2019, it had only been used 3 times: see keynote lecture by Sir Rupert Jackson on "*the Interplay between Judges and Arbitrators*" for the 17th Annual Review of the Act, on 26 March 2019.

Stacey J. Rappaport	srappaport@milbank.com	+1 212.530.5347
Fiona A. Schaeffer	fschaeffer@milbank.com	+1 212.530.5651
Jed M. Schwartz	jschwartz@milbank.com	+1 212.530.5283
Alan J. Stone	astone@milbank.com	+1 212.530.5285

Washington, DC | International Square Building, 1850 K Street, NW, Suite 1100, Washington, DC 20006

David S. Cohen	dcohen2@milbank.com	+1 202.835.7517
Andrew M. Leblanc	aleblanc@milbank.com	+1 202.835.7574
Aaron L. Renenger	arenenger@milbank.com	+1 202.835.7505

Los Angeles | 2029 Century Park East, 33rd Floor Los Angeles, CA 90067-3019

Lauren N. Drake	ldrake@milbank.com	+1 424.386.4320
Gary N. Frischling	gfrischling@milbank.com	+1 424.386.4316
David I. Gindler	dgindler@milbank.com	+1 424.386.4313
Y. John Lu	jlu@milbank.com	+1 424.386.4318
Alex G. Romain	aromain@milbank.com	+1 424.386.4374

Munich | Maximilianstraße 15, 80539 Munich

Ulrike Friese-Dormann	ufriese@milbank.com	+49 89.25559.3646
Peter Nussbaum	pnussbaum@milbank.com	+49 89.25559.3636
Alexander Rinne	arinne@milbank.com	+49 89.25559.3686
Christoph Rothenfusser	crothenfusser@milbank.com	+49 89.25559.3656

Litigation & Arbitration Group

Please feel free to discuss any aspects of this Client Alert with your regular Milbank contacts or any member of our Litigation & Arbitration Group.