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New English arbitration reforms clear Parliament and are set to become law

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The Arbitration Bill has cleared the UK Parliament and is set to become law. We take a look at the resulting reforms that will be made to English arbitration law, for which parties should prepare.

Contents

What has happened?

Since last July, the UK Government's Arbitration Bill has been progressing through Parliament. Having started in the House of Lords, it cleared its passage through the Commons on 11 February 2025, meaning all that remains is the formality of Royal Assent. The Bill will then become an Act, likely the Arbitration Act 2025 (**2025 Act**). Its overall aim is to enact recommendations made by the Law Commission of England and Wales in its 2023 report on the Arbitration Act 1996 (the **AA**), the main statute which regulates arbitration in England and Wales, and Northern Ireland.

The 2025 Act will not be a "stand-alone" Arbitration Act. Instead, it will insert a number of amendments into the AA – which remains the "main" statute.

What is set to change?

In overview, the main reforms are as follows:

Applicable law of an arbitration agreement: The 2025 Act will insert a new s.6A into the AA providing a new conflict of laws rule for determining the law applicable to an arbitration agreement.1 That section applies the law that the parties have expressly agreed to apply, or, where there is no such agreement, it is the law of the seat of the arbitration in question.

Importantly, for the purposes of the above, the rule then goes on to say that agreement between the parties that a particular law applies to an agreement of which the arbitration agreement is part is not to constitute express agreement that that law also applies to the arbitration agreement. In other words, the idea is that unless the parties *specifically* address the law applicable to their arbitration agreement, then the "default" rule of the law of the seat will apply.

1 This determines the contractual "validity and scope" of the arbitration agreement itself – as distinct from the parties' main contract. The reason arbitration agreements are said to have their own governing law is because, generally, they are regarded as "separable" from the main contract in which they are located. Furthermore, in England, the conflict of laws rule which determines that law is not provided by the Assimilated Rome I Regulation (arbitration agreements, and jurisdiction agreements, are excluded from the scope of that instrument).

This new rule is designed to replace the common law interpretative approach that the UKSC set out in a series of decisions starting with *Enka v Chubb*, and most recently developed in *UniCredit*. Generally, that (in the absence of more specific designation) treats the parties' express choice of governing law over their main contract as extending to the arbitration agreement.

Supporters of change criticised that approach, rooted in assessing the parties' contractual intention, as remaining somewhat open-ended, and (where English law was not the chosen law of the main contract) favouring the application of foreign law. Whilst acknowledging reasonable concerns with altering the approach decided by the UKSC, and that there was no conclusive argument in favour, the Law Commission nonetheless recommended this change and it has been duly included.

In practice, the new rule will have most impact where the law that the parties have chosen to govern their contract doesn't "match" with the seat (e.g. French law contract with arbitration seated in England). This is the situation in which, absent specific wording, debate has arisen as to which one of those laws is the applicable law of the arbitration agreement. For English seated arbitration agreements, to avoid any such debate, prudent practice has, in such a situation, already been, at the drafting stage, to insert a specific designation as to the law applicable to the arbitration agreement (such a designation also having effect under common law). Below, we consider why, even with this new rule, such a practice will remain sensible (see "*New drafting considerations…*" below).

Two further, separate, observations on s.6A. First, it is not only applicable by English courts and English seated tribunals in determining the jurisdiction of the latter. A new s.2(ZA) AA *also* extends it to arbitrations where the seat is outside England. In practical terms, this means the English court is to apply the rule when considering questions relating to foreign seated arbitrations, such as to whether to stay proceedings under s.9 AA, or whether an anti-suit injunction might be granted (as in *UniCredit*). It is, however, not clear whether the same also extends to cases involving recognition and enforcement of a foreign award in England and invalidity arguments under Article V(1)(a) New York Convention. That Article its own rule on applicable law, which is enacted in Part II/s.103(a) AA. That has not been altered (as it incorporates Article V(1)(a)) and, in *Kabab-Ji*, it was interpreted in line with the common law.

Second, new s.6A is expressed not to apply to cases involving arbitration pursuant to investment treaties (or national investment legislation). It was thought that application of s.6A might upset an expectation that, in such cases, public international law/the relevant legislation should apply (albeit, in this sphere, the AA only applies to non-ICSID cases as ICSID cases have their own regime).

Codifying arbitrators' duty of disclosure: Under the AA, arbitrators are under a duty of impartiality. In *Haliburton v Chubb*, the UKSC recognised that an arbitrator should also disclose circumstances relevant to their impartiality (and outlined when). A new s.23A AA codifies the *Haliburton*

duty, it being thought that the accessibility/visibility of such an important rule would be improved by enshrining it in statute (as well as providing the opportunity to extend it to pre-appointment discussions).

Immunity of arbitrators: Although s.29 AA confers a general immunity on arbitrators, the Law Commission recommended that this be extended to cases where arbitrators resign (unless the resignation was unreasonable), and in relation to any costs award made against them in respect of an application to court for their removal (unless the arbitrator acted in bad faith). In the former case this was to better recognise that there may be some cases where an arbitrator has good reason to step down. In the latter, it was to neutralise any risk that parties might use applications to remove an arbitrator as a means of putting illegitimate pressure on them through the risk of associated costs awards. The reforms are carried through by amendments to ss.24,25 and 29 AA.

Summary disposal: Traditionally, one of the criticisms levied at arbitration has been that tribunals may, because of due process concerns, be cautious about using procedural discretions to summarily dispose of matters. Increasingly, institutional rules have sought to reverse that trend by making such powers express. Against that background, it was thought that explicit statutory recognition might further encourage such action in appropriate cases. Accordingly, new s.39A AA creates a default power of summary disposal for English seated tribunals, exercisable on application by a party, and subject to a test of no real prospect of success on the relevant issue.

S. 44 AA and third parties: S.44 AA sets out certain coercive powers that the English court can use to assist arbitration proceedings. Difficulty has, however, arisen about the extent to which these can be used against third parties. Decisions took different views and said it might even depend on the precise power exercised (see *CvD*). In order to cut through this, s.44 AA is amended to make clear that all orders within its scope can be made against third parties (although, in recognition of their status, third parties are provided with slightly more width to appeal such an order).

Emergency Arbitrators (EAs): In recent years, many institutional rules have included EA provisions which aim to provide a mechanism for the grant of short-term, urgent measures prior to the formation of the tribunal. The Law Commission's review considered whether, and if so, how, the AA could best recognise/support these mechanisms. Ultimately, the reforms do so in two ways. First, ss.41 and 42 AA are amended to provide EAs with a default power to make peremptory orders and for these to be enforced by court order in the same way as a peremptory order made by the tribunal. Second, EAs are given the ability to grant permission (in non-urgent cases) for an application under s.44 AA to be made to court.

Challenges to a tribunal's award on jurisdiction (s.67 AA): This area provoked debate because such challenges, in principle, involve a full rehearing by the English court, even after a full determination by the tribunal itself (*Dallah*). Some criticised this as a wasteful "second bite at the cherry" whilst others maintain that it reflects important matters of principle concerning the ultimate existence of an agreement to arbitrate. In the end, a

compromise has been deployed with reforms aimed at promoting greater procedural efficiency insofar as the tribunal's jurisdiction has already been fully contested. Accordingly, s.67 AA is amended to permit court rules to be made which, in such cases, would limit the ability of parties to rely on new grounds, or new evidence, before the court if not put before the tribunal, and restrict the court's ability to re-hear evidence (all subject to the court ruling otherwise in the interests of justice).

***English court powers to issue preliminary rulings on the tribunal's jurisdiction (s.32 AA) and determine a preliminary point of English law (s.45 AA)*:** Finally, in a section headed "Miscellaneous minor amendments" the 2025 Act makes some potentially important amendments to the above. Under the sections as *un*amended, in both cases, and assuming the parties have not all positively agreed to the reference, certain preconditions have to be satisfied before the court can hear an application to it. Not only must the tribunal consent, but the court must be satisfied that the application is likely to produce substantial savings in costs, that it was made without delay, and (in the case of s.32) that there is good reason for the court to decide it.

Under the 2025 Act, although the need for tribunal permission is retained, the other preconditions are deleted and replaced with a general discretion for the court to decide whether to proceed. The thinking was to simplify the sections, and that the deleted preconditions were unnecessary given the requirement for tribunal consent. However, the flip side is a possibility that this encourages more applications under the sections. In the context of s.45 (which, unlike s.32, is non-mandatory) that potentially raises an issue as to whether parties may now wish, on a more regular basis, to opt-out of that section in English seated arbitration agreements (see *New drafting considerations…* below).

When in force?

Once the formality of Royal Assent takes place, the Bill will fully enter the statute book. Then, its reforms will come into force on a date (or dates) to be specified by statutory instrument. And, unless stated differently therein, they will apply to any arbitration (or any court proceedings related to such an arbitration) commenced on or after the date the relevant reform came into force (s.17 2025 Act). With the Bill's substantive passage now complete, however, this is all likely to be only a matter of a short period of time. So, it would be prudent for parties to now familiarise themselves with the reforms and how they may affect any anticipated English seated arbitrations, or the drafting of English seated arbitration agreements (see *New drafting considerations…*below).

Click here for further information on the Arbitration Bill, including its text.

New drafting considerations for English seated arbitration agreements

> **Specific drafting as to an arbitration agreement's governing law – still needed?**

As stated above, it will remain prudent, when the seat of arbitration is in England and a foreign (not English) law is chosen to govern the main contract, to continue to include, in drafting the arbitration agreement and in addition to a usual governing law clause, a specific designation of the law applicable to the arbitration agreement (for example: "*This clause [number] shall be governed by [x] law*"). This is for a number of reasons:

First, if the parties wish their arbitration agreement to be governed by the same law as that chosen to govern their main contract (as opposed to English law as the law of the seat), then such action will be necessary given the terms of new s.6A AA. As to whether that is desirable, parties may consider that choosing the same law as the main contract presents a simpler starting point at the drafting stage, as it better ensures alignment between the arbitration agreement and the main contract on key issues of formation (such as who is treated as party to both and how it is substantively concluded), as well as internal consistency in their operation and drafting more generally (for examples of points of internal consistency see *Enka* at [53] and [235-239]).

Second, if, despite the above, the parties wish their arbitration agreement to be governed by English law (as the law of the seat), a specific designation may still be prudent as, although the legislative intent behind s.6A seems clear, it may be possible that the operation of its "default" rule remains debatable. In particular, in *UniCredit*, the UKSC emphasised that its conclusions (albeit under the common law) were rooted in an understanding of the meaning and scope of the *express* words that the parties used in their "general" governing law clause.

Finally, whichever one of the law of the main contract, or English law as the law of the seat, parties wish to govern their arbitration agreement, specifying that choice can help promote certainty under Article V(1)(a) New York Convention if enforcement of the award is sought abroad.

Either way, whichever law is to be applied, parties are well advised, as part of the drafting process, to satisfy themselves that the arbitration clause is properly drafted and works as intended under that law.

> **s.45 AA – Court determinations of a preliminary point of (English) law**

Leaving to one side cases where the parties positively agree to such an application (which are very rare), one consequence of the, soon to be deleted, statutory preconditions in s.45.AA may have been to leave, in the past, the question of opting out of s.45 AA somewhat "neutral". The

conditions of its operation were appreciably narrow and rooted in costs savings (there have been very few reported s.45 cases). Further, even if such an application proceeded, the section does not involve re-opening a determination by the tribunal, which can also proceed with the arbitration whilst the decision is pending (s.45(4) AA).

To a degree, some features will remain the same, with permission of the tribunal still required, and other procedural aspects unchanged. The difference is that, without the specifically enumerated preconditions, there is a possibility that tribunals (and, if a tribunal gives permission, the English courts) are more frequently petitioned to accede, and on more open-ended grounds. Therefore, on balance, to avoid any such debates and to promote efficiency in the arbitration, it may be prudent to simply opt out of s.45 when drafting English seated arbitration agreements (assuming, as is usual, the absence of any wish for exceptional drafting seeking to heighten any ability of the court to rule on, or review, substantive points before the tribunal). Example wording which could be inserted to effect this is as follows:

"*For the purposes of arbitration pursuant to this clause [number], the parties waive any right of application to any court to determine a preliminary point of law or appeal on a point of law under Sections 45 and 69 of the Arbitration Act 1996.*"

(Note: s.69 AA is a different, non-mandatory, provision, concerning appeals against on a point of English law arising out of an award. In English seated arbitration agreements, this is commonly excluded on the basis of promoting finality, and minimal court intervention, in the arbitration award. Often this is by way of use of institutional rules, as many of the leading rules contain provisions which have been held to have such an effect (e.g. ICC Rules Art. 35(6), LCIA Rules Art. 26.8). Therefore, whilst a different point and, often, likely to have already been excluded in any event, such drafting, as opposed to a sole reference to s.45, carries the benefit of clearly dealing with, in one place, the two, non-mandatory provisions of the AA by which the English court can become involved in the merits of the tribunal's decision.

Finally, whilst, technically, under those sections the court can only, in the first place, consider points of English law, inclusion of such wording can still be beneficial even if the parties have chosen a different law to govern their main contract. This is because, depending on the circumstances, it may still be possible for points of English law to arise as a matter of wider legal context in such disputes).

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