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RESEARCH ARTICLE

The UK Law Commission's Reforms Proposed to the English Arbitration Act 1996: Bonum, Malum Et Turpe

Birleşik Krallık Hukuk Komisyonu'nun 1996 tarihli İngiliz Tahkim Kanunu'na Reform Önerilerinin Eleştirel Değerlendirilmesi

Doğan Gültutan *

Abstract

The 1996 Act has completed its quarter-century cycle of existence. At the time of its enactment, it was praised by scholars and practitioners as a "*masterful… comprehensive*" piece of legislation and one that was destined to "*enhance the attractiveness of England as an arbitral forum*". These predictions proved exceedingly accurate. However, over time the legislation's various shortcomings began to surface. Its review by the Law Commission was, therefore, very timely. This paper considers the present state of English arbitration law considering the provisions of the 1996 Act and substantive and/or noteworthy recommendations proposed to the legislation, alongside the relevant case-law, and considers the appropriateness and potential utility of these recommendations. In particular, this article considers the following issues: the governing law of an arbitration agreement, the arbitrators' duty of disclosure, their immunity from liability, the summary disposal of claims and defences, the confidentiality of arbitration and court powers in support of arbitral proceedings and emergency arbitrations. The paper concludes that although the reform proposals are mostly commendable and sufficient to satisfy users' concerns and expectations, not all are agreeable. Reform proposals do not go far enough. Most notably, the rule concerning the arbitrators' duty of disclosure should recognise that, in appropriate instances, the subjective expectations of the parties should be addressed in the assessment. The parties' reasonable and/or legitimate expectations should not be ignored when deciding what facts and circumstances to disclose to ensure that the parties retain confidence in the process and remain the ultimate arbiters of their dispute.

Keywords

Arbitration, Reform, Confidentiality, Disclosure, Governing Law, Seat of Arbitration, Immunity, Summary Disposal, Emergency Arbitration

* **Corresponding author:** Doğan Gültutan (Dr.), City, University of London, School of Law, London, England.
E-mail: Dogan-Ali.Gultutan@city.ac.uk ORCID: 0009-0003-4385-9990

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I. Introduction

In England, arbitration is governed by the Arbitration Act 1996 (the "1996 Act")[1], which entered into force on 31 January 1997. The legislation is broadly based on the United Nations Commission on International Trade Law ("UNCITRAL")'s Model Law.[2] It applies to arbitrations conducted and proceedings relating to arbitration before the English courts, Wales and Northern Ireland, excluding Scotland.[3]

The 1996 Act has been largely unamended since its entry into force and has been, for some time, praised as one of the most successful, arbitration friendly and modern statutes promoting the development and use of arbitration to resolve disputes.[4] As early as 1998, it was described as an "*outstanding, indeed masterful, legislative framework on arbitration… [being] a highly accessible statutory framework both from a linguistic and organizational standpoint…[and a legislation that is] comprehensive, thorough, cogent and coherent*".[5] Another scholar, commenting positively on the then recent enactment, foresaw (rightly so) in 1997 that the 1996 Act "*will effect very welcome improvements in the English law of arbitration, and will enhance the attractiveness of England as an arbitral forum*".[6]

However, developments in the field of arbitration over the quarter of a century have necessitated a re-look and re-consideration of the Act and an assessment of whether it serves and, more importantly, can continue to serve the needs of the arbitration community.[7] Concurringly, in March 2021, the UK Ministry of Justice instructed the Law Commission to review and propose necessary recommendations to the legislation, coinciding with the twenty-fifth anniversary of the legislation. This resulted in an arbitration bill being put before the UK Parliament in 2024, which is expected to be enacted within the year. This paper considers the present state of English arbitration law in light of the provisions of the 1996 Act and substantive and/or noteworthy recommendations proposed to the legislation, alongside the relevant case-law, and considers the appropriateness and potential utility of these recommendations. A certain

1 Arbitration Act 1996 (c 23); full title: An Act to restate and improve the law relating to arbitration pursuant to an arbitration agreement; to make other provisions relating to arbitration and arbitration awards; and for connected purposes, passed on June 17, 1996.

2 The UNCITRAL Model Law on International Commercial Arbitration of 1985, which was later amended in 2006. See here: https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration (accessed on June 23, 2024).

3 1996 Act, section 108.

4 See, Myriam Gicquello, 'Reviewing the Arbitration Act 1996: A Difficult Exercise?' (2023) 2(4) Amicus Curiae, Series *2* 391, 393-394.

5 Thomas E Carbonneau, 'A Comment on the 1996 United Kingdom Arbitration Act' (1998) 22 Tulane Maritime Law Journal 131, 154, 131-132.

6 Fraser P. Davidson, 'The new Arbitration Act – a Model Law?' (1997) Journal of Business Law 101-129, 128. See also V. Chenu, 'The Arbitration Act 1996: One Year on: The New Provisions Under the Microscope and Recent Cases' (1998) 6(5) International Insurance Law Review 165-166.

7 Carbonneau (n 5) 132, wherein Carbonneau noted that the 1996 Act did not "*achieve absolute perfection*", principally on the basis that "*it retains a version of the right of judicial appeal of the merits of arbitral awards and a restricted right of appeal on questions of law during the proceeding. For good or ill, England remains one of the few national jurisdictions that allows judicial supervision of arbitration on the merits*."

number of issues considered but not proposed for reform will also be analysed to determine whether the Law Commission's rationale for not reforming those areas was justified.

II. Arbitration Act 1996: general principles

Part 1 of the 1996 Act applies to arbitrations that have their seat of arbitration "*in England and Wales or Northern Ireland*".[8] However, it should be noted that certain provisions of Part 1 apply to foreign seated arbitrations, i.e., arbitrations that are not seated in England and Wales or Northern Ireland. Section 2(2) states that sections 9 to 11, principally concerning the stay of legal proceedings, and section 66, concerning the enforcement of arbitral awards, apply "*even if the seat of the arbitration is outside England and Wales or Northern Ireland or no seat has been designated or determined*".

Furthermore, section 2(3) states that the powers conferred on the court by sections 43 and 44, concerning securing the attendance of witnesses and court powers exercisable in support of arbitral proceedings, respectively, may be exercised "*even if the seat of the arbitration is outside England and Wales or Northern Ireland or no seat has been designated or determined*". Unlike under section 2(2), the court has a discretionary power under section 2(3), such that it is entitled to refuse to exercise such power if it considers that "*the fact that the seat of the arbitration is outside England and Wales or Northern Ireland, or that when designated or determined the seat is likely to be outside England and Wales or Northern Ireland, makes it inappropriate to do so*".

The 1996 Act adopts a non-interventionist, party autonomy, and arbitration-friendly approach. In *Halliburton*, Lord Hodge (with whom Lords Reed and Lloyd-Jones, and Lady Black concurred) made the following supporting observation: "*The 1996 Act is based on the principle of party autonomy and aims to limit the role of the courts to the protection of the public interest*".[9] In the same vein, Haddon-Cave LJ (with whom the other two judges concurred) in the *Haven* Insurance case expressed as follows:

> "*The AA 1996 brought about a sea-change in the world of arbitration: it gave full effect to the notion of 'party autonomy' and abandoned the idea that the courts enjoyed "some general power of supervisory jurisdiction over arbitrations"… Post-1996, the world of arbitration entered a new era, in which the scope for interference by the court in arbitral decisions became highly circumscribed*."[10]

Section 1 of the 1996 Act, which sets out the general principles on which Part 1 is founded, stipulates that "*the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest*".[11] This

8 1996 Act, section 2(1).

9 *Halliburton Co v Chubb Bermuda Insurance Ltd.* [2020] UKSC 48, [47].

10 *Haven Insurance Co. Ltd. v EUI Ltd. (t/a Elephant Insurance)* [2018] EWCA Civ 2494, [28]-[29].

11 1996 Act, section 1(b).

is an express regulation of the principle of party autonomy over arbitral proceedings. More importantly, the Act recognises the following general principle: "*in matters governed by this Part the court should not intervene except as provided by this Part*".[12] This provides for an express statutory footing regarding the non-interventionist approach of the 1996 Act and the requirement that English courts also refrain from interfering with arbitral proceedings, unless absolutely necessary.[13]

In line with the adopted non-interventionist approach, the 1996 Act limits the recourse available to disgruntled parties against arbitral awards. A tight framework is provided for under sections 67 to 69. Section 66 stipulates that an "*award made by the tribunal pursuant to an arbitration agreement may, by leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect*".[14] This paves the way for the courts to recognise and enforce arbitral awards without considering the merits or conducting a *de novo* review. Regarding the power under section 66, the High Court explained in *Sterling v. Rand* as follows:

> "*Any arbitration award that has not been challenged is final and is treated as binding. It should ordinarily be enforceable, and s.66 should be a straightforward remedy for achieving that. The provisions of the 1996 Act are firmly in favour of giving effect to arbitration awards and enabling them to be enforced. The starting point is the statutory policy in favour of giving effect to an unchallenged award*."[15]

An arbitral award may be challenged in one of three ways under the 1996 Act: (i) a challenge on the basis of substantive jurisdiction under section 67, (ii) a challenge on the basis of serious irregularity under section 68, and (iii) an appeal against the award on a point of law under section 69, each of which is considered in turn as follows.

Section 67 permits a challenge against an arbitral award where it can be shown that the arbitral tribunal lacked substantive jurisdiction to hear and determine the matter. This is a high threshold, and a challenge under section 67 rarely succeeds. Corroborating this, the Commercial Court's report for the years 2022-2033 explains that during the judicial year, 8 applications were filed under section 67, which represented a 70% reduction from the 27 applications filed in the previous judicial year, of which 2 were dismissed on the papers, 1 was discontinued and 5 remain pending.[16] By way of context, during the previous judicial year (i.e., 2021-2022) there were 27 applications received, of which 5 were dismissed on the papers, 1 was discontinued, 1 was unsuccessful, and 20 remained pending.

12 1996 Act, section 1(c).

13 See, *Halliburton Co v Chubb Bermuda Insurance Ltd* [2020] UKSC 48, [47]; and *Haven Insurance Co Ltd v EUI Ltd (t/a Elephant Insurance)* [2018] EWCA Civ 2494, [28]-[29].

14 1996 Act, section 66(1).

15 *David Sterling v Miriam Rand* [2019] EWHC 2560 (Ch), [65].

16 Business and Property Courts, The Commercial Court Report 2022-2023 (Including the Admiralty Court Report), February 2024: https://www.judiciary.uk/wp-content/uploads/2024/03/14.448_JO_Commercial_Court_Report_2223_WEB.pdf, page 13 (accessed on June 23, 2024).

Where the court agrees with the applicant party that the tribunal lacked substantive jurisdiction to determine the matter, it may do one of two things: vary the award or set aside the award in whole or in part.[17]

Regarding a challenge under section 68, an applicant may succeed in challenging an arbitral award if it can show that there was a "*serious irregularity affecting the tribunal, the proceedings or the award*".[18] Again, the threshold is exceedingly high. Courts will expect convincing evidence of irregularity that reaches the requisite level of seriousness to permit a challenge against an arbitral award. This is because a successful challenge usually results in the setting aside of the arbitral award, requiring the parties to "re-arbitrate" the dispute, with the subsequent time and cost consequences.

Section 68(2) provides some guidance regarding what may constitute "serious irregularity", which are as follows:

- "*failure by the tribunal to comply with section 33 (general duty of tribunal);*
- *the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction: see section 67);*
- *failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties;*
- *failure by the tribunal to deal with all the issues that were put to it;*
- *any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award exceeding its powers;*
- *uncertainty or ambiguity as to the effect of the award;*
- *the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy;*
- *failure to comply with the requirements as to the form of the award; or*
- *any irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award*."

Where an applicant establishes "serious irregularity" affecting the tribunal, the court may "*(a) remit the award to the tribunal, in whole or in part, for reconsideration, (b) set the award aside in whole or in part, or (c) declare the award to be of no effect, in whole or in part*", but is to exercise the powers under (b) or (c) "*[if] it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration*".[19]

17 1996 Act, section 67(3).

18 1996 Act, section 68(1).

19 1996 Act, section 68(3).

The Commercial Court's report for the years 2022-2033 explains, relevantly, that during the judicial year, the Court received 25 section 68 applications, which represented a 37% decrease compared to 40 applications the previous year, of which 4 applications were dismissed at a hearing, 7 applications were dismissed on the papers, 1 was discontinued, 1 was settled and 1 transferred out. The remaining 11 were pending.[20]

Finally, a party may appeal against an arbitral award on a point of law, essentially on the ground that the arbitral tribunal erroneously applied the applicable law. It must be noted, however, that the parties are permitted to opt out of this right; as such, the right to appeal on a point of law exists only if the parties have not agreed otherwise, unlike the position in respect of sections 67 and 68.[21]

Section 69(1) provides that "[*U]nless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings*." The Act clarifies that where the parties have agreed to dispense with reasons in respect of the arbitral award, such will be treated as an opt-out and will exclude the courts' jurisdiction for the purposes of an appeal on a point of law.[22] An appeal under section 69 requires the leave of the court, unless the parties have agreed otherwise.[23] The court will not grant the leave required if it is not satisfied the following:

> "*(a) that the determination of the question will substantially affect the rights of one or more of the parties,*
>
> *(b that the question is one which the tribunal was asked to determine,*
>
> *(c) that, on the basis of the findings of fact in the award— (i)the decision of the tribunal on the question is obviously wrong, or (ii)the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and*
>
> *(d) that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question*."[24]

The leave requirements are evidently onerous and will not always be satisfied. This is primarily intended to ensure the finality of the arbitral process and to avoid disgruntled parties from clogging up the judicial system with unnecessary appeals.[25]

20 Business and Property Courts, The Commercial Court Report 2022-2023 (Including the Admiralty Court Report), February 2024: https://www.judiciary.uk/wp-content/uploads/2024/03/14.448_JO_Commercial_Court_Report_2223_WEB.pdf, page 12 (accessed on June 23, 2024).

21 1996 Act, sections 67(1), 68(1) and 69(1) and Schedule 1 (mandatory provisions of Part 1).

22 1996 Act, section 69(1).

23 1996 Act, section 69(2).

24 1996 Act, section 69(3).

25 See, *Union of India v Reliance Industries Limited* [2022] EWHC 1407 (Comm), for an example of a restrictive/narrow construction of the statutory provision.

The Commercial Court's report for the years 2022-2033 explains, relevantly, that during the judicial year 46 applications were received that judicial year, compared to 40 received the previous year, of which 9 had permission granted, 6 had permission refused, 1 appeal was dismissed following a hearing, 5 appeals were dismissed on the papers, 2 were discontinued, 3 were transferred out, and 20 were awaiting a permission decision.[26]

Notwithstanding the fact that challenges against arbitral award rarely come to fruition, the bulk of the claims made to the Commercial Court are premised on sections 67-69 of the 1996 Act, all of which are primarily aimed at challenging an award issued. The "Commercial Court Report 2022–2023" confirmed that "*[t]he bulk of the arbitration claims issued are: challenges to awards on grounds of jurisdiction under section 67 of the Arbitration Act 1996; challenges alleging irregularity (section 68 applications); and appeals on a point of law (section 69 applications).*"[27]

Having set out above the general principles of the 1996 Act, this paper will now move to consider the proposed reforms by the Law Commission to the 1996 Act.

III. Reform proposals

A. In General

As mentioned above, the Law Commission was instructed, in March 2021, with the task to consider "*whether any amendments to the Act were needed to ensure that it remains fit for purpose and continues to promote England and Wales as a leading destination for commercial arbitration*".[28] The Law Commission is an independent law commission set up by the UK Parliament to review the law of England and Wales and recommend reforms.[29]

The request initiated the Commission's consultation process.[30] In September 2022, the Commission published its first consultation paper and invited comments and responses from the arbitration community. The consultees, that is, those who responded to the consultation papers, ranged from individual practitioners, academics and specialist bodies, to major domestic and international firms and institutions. Responses to the first consultation paper were received by December 2022. The Commission considered the responses and produced a second consultation paper in

26 Business and Property Courts, The Commercial Court Report 2022-2023 (Including the Admiralty Court Report), February 2024: https://www.judiciary.uk/wp-content/uploads/2024/03/14.448_JO_Commercial_Court_Report_2223_WEB.pdf, page 11 (accessed on June 23, 2024).

27 ibid 10.

28 Law Commission's "Review of the Arbitration Act 1996: Final report and Bill" (Law Com No 413) dated September 6, 2023 (the "Final Report"), paragraph 1.8.

29 See Law Commissions Act 1965; https://lawcom.gov.uk/ (accessed on June 23, 2024).

30 See here: https://lawcom.gov.uk/project/review-of-the-arbitration-act-1996/ (accessed on June 23, 2024).

March 2023. By May 2023, responses were received from the consultees on the second consultation paper, following which the Commission produced its final report on its proposed reforms in September 2023. The consultees' general view was that the Act "*works well, and that root and branch reform is not needed or wanted*".[31] Therefore, the Law Commission proposed only minimal reforms.

The Final Report was accompanied by an Arbitration Bill, the adoption of which would implement the Law Commission's recommendations.[32] The Bill is currently before Parliament and is being discussed in the House of Lords.[33] It will then be discussed by Members of Parliament in the House of Commons, and if approved, it will be given Royal Assent. It is expected that the Bill will be finalised and passed through parliament in late 2024 or early 2025.

Among the various proposed reforms to the 1996 Act, the following five proposals stand out as noteworthy and worth discussion:

- New rule on the governing law of an arbitration agreement;
- Codification of an arbitrator's duty of disclosure;
- Strengthening arbitrator immunity around resignation and removal;
- Introduction of the power of summary disposal;
- Clarification of court powers in support of arbitration proceedings and emergency arbitration.

The above proposals are, in turn, considered as follows.

a) Governing law of the arbitration agreement

The Commission's recommendation is that the arbitration agreement be governed by the law that the parties expressly agree applies to the arbitration agreement or by the law of the seat.[34] This would change the current position, which was recently established by the UK Supreme Court in *Enka*.[35] The *Enka* approach may be summarised as follows:

- The applicable law for an arbitration agreement shall be the law that the parties expressly choose to apply to it. If no such agreement exists, the arbitration agreement will be subject to the law with which it is most closely connected.
- Where no express party agreement exists in respect of the law applicable to the arbitration agreement, the law applicable to the underlying agreement that

31 Final Report, paragraph 1.22.

32 ibid paragraph 1.6.

33 See here: https://bills.parliament.uk/bills/3515 (accessed on June 23, 2024).

34 Final Report, paragraph 12.72 *et seq*.

35 *Enka Insaat ve Sanayi AS v OOO Insurance Company, Chubb* [2020] UKSC 38.

contains the arbitration agreement will apply as the law most closely connected to the arbitration agreement (as an implied choice).

- The laws of the seat of the arbitration may be deemed to (impliedly) apply to the arbitration agreement, instead of the law governing the underlying agreement, where certain factors exist, such as (i) a provision of the law of the seat of the arbitration indicating that that jurisdiction's laws will apply to arbitrations seated there or there exists a serious risk that the arbitration agreement would be ineffective if the law of the underlying agreement applies to the arbitration agreement.

- Where the underlying agreement does not stipulate a governing law, the law of the seat of the arbitration will be the law applicable to the arbitration agreement, which is the law most closely connected to it.

The aforementioned analysis essentially resulted in the governing law that was selected to apply to the underlying contract applying also to the arbitration agreement contained within it, disregarding, in most cases, the laws of the seat of the arbitration. This approach was criticised by the consultees as being "*complex and unpredictable*".[36] This is one of the most significant changes proposed in the draft legislation.

The rationale behind the proposal provided by the Commission are as follows:

- a default rule in favour of the law of the seat would see more arbitration agreements governed by English law for arbitrations seated there, which would ensure the applicability of the doctrine of separability[37], along with its practical utility;[38]

- the default rule would preserve party autonomy in the choice to arbitrate, without the express choice being undermined by an implied choice of foreign governing law with potentially less generous provisions on arbitrability, scope, and separability;[39] and

- the default rule has the virtues of simplicity and certainty.[40]

The proposed reform is therefore welcomed. It is more appropriate that the arbitration agreement be governed, by default and subject to the parties' express agreement, by the law of the seat of the arbitration. This is not only more in line

36 Final Report, paragraph 12.20.

37 The doctrine of separability refers to arbitration agreements being "*presumptively "separable" or "severable" from the contract within which they are found (sometimes termed the "main" or "underlying" contract)*": Gary Born, *International Arbitration: Law and Practice*, Third Edition (Kluwer Law International 2021), paragraph 2.04.

38 Final Report, paragraph 12.72.

39 Ibid paragraph 12.73.

40 Ibid paragraph 12.74.

with the parties' general expectations when agreeing to a seat of arbitration, but will also ensure that English law is more consistent with other established arbitration jurisdictions.[41] The proposal will help prevent inconsistent rulings by English and foreign courts regarding the same arbitration agreement, avoiding "Kabab-Ji like"[42] unwanted scenarios populating the case reports.

Kabab-Ji was a case in which the parties, Al Homaizi Foodstuff Company ("AHFC") and Kabab-Ji SAL ("Kabab-Ji"), entered into a franchise development agreement in 2001 concerning the granting of a licence to operate a franchise in respect of a "*distinctive type of restaurant specialising in Lebanese and other Middle Eastern cuisines*".[43] The agreement was subject to English law, referring disputes arising thereunder to ICC arbitration in Paris.[44] In 2005, AHFC became Kout Food Group's ("KFG") subsidiary following a corporate restructuring. A dispute arose under the agreement regarding the payment of royalties. Kabab-Ji started its claim only against KFG, not AHFC. The arbitrators ruled, by majority, that KFG was bound by and in breach of the agreement, despite never having formally become a party to the arbitration agreement. KFG sought to set aside the final award in Paris. Correspondingly, Kabab-Ji sought the enforcement of the award in England. Both actions were dismissed by the respective courts, allowing the English and French courts to reach diametrically opposed outcomes.

The English Commercial Court held that the agreement (including the arbitration agreement) was governed by English law and, applying English law principles, KFG had not become a party to the arbitration agreement and could therefore not be in breach thereof. It therefore refused to make a final determination, refusing enforcement. The Court of Appeal agreed that the governing law was English law, that KFG was not a party and was not in breach, but differed with the Commercial Court on the issue of making a final determination, holding that the court below should have made a final determination, and itself made such a determination.[45] The appellate court reasoned that there was no real prospect of it being shown that KFG had become a party to the arbitration agreement and that summary judgment should be issued, refusing recognition and enforcement of the award.[46]

On appeal, the UK Supreme Court unanimously dismissed the appeal and upheld the Court of Appeal's findings. Lords Hamblen and Leggatt, who gave the sole joint judgment (with which the other Justices agreed), explained as follows:

41 See, Maxi Scherer and Ole Jensen, 'Towards a Harmonized Theory of the Law Governing the Arbitration Agreement' (2021) 10(4) Indian Journal of Arbitration Law 1.

42 See Kabab-*Ji SAL (Lebanon) v Kout Food Group (Kuwait)* [2021] UKSC 48.

43 ibid paragraph 3.

44 Ibid paragraph 5.

45 *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* [2020] EWCA Civ 6.

46 ibid paragraphs [70], [81].

"*In the above circumstances, we are satisfied that the Court of Appeal was both entitled and correct to conclude that as a matter of English law, there was no real prospect that a court might find at a further hearing that KFG became a party to the arbitration agreement in the FDA. Given the terms of the No Oral Modification clauses, the evidential burden was on the claimant to show a sufficiently arguable case that KFG had become a party to the FDA and hence to the arbitration agreement in compliance with the requirements set out in those clauses, or that KFG was estopped or otherwise precluded from relying on the failure to comply with those requirements. On the findings made by the judge and the evidence before the court, such a case was not and has not been made out.*"[47]

As for the French courts, the Paris Court of Appeal dismissed the annulment action shortly after the English Court of Appeal's judgment had been rendered, which was later upheld by the French Court of Cassation. The French courts ruled that, as a matter of French law, the law of the seat of arbitration, not the law of the main contract, governed the arbitration agreement. The result was that the arbitration agreement extended to KFG, the non-signatory entity.[48]

Such judicial friction is obviously undesirable because it results in uncertainty for the parties, their legal representatives and the arbitrators. It also paves the way for tactical warfare of the sort unwanted, giving unsatisfied parties potential second (and more) bites at the cherry. The finality of arbitration is its most attractive asset and should not be permitted to be eroded by inconsistent application of rules and principles if it can be facilitated. The proposed reform will provide the parties with the desired certainty regarding seat selection, knowing that their seat selection will resolve almost all matters regarding the arbitration process and procedure.[49] Consequently, it is hoped that the proposal will be enacted in the currently proposed form.

B. Arbitrators' Duty of Disclosure

The Commission's proposal is to codify the currently case-law based test on the disclosure of arbitrators. The Commission considers that it would be "*appropriate that such an important duty be recognised in the [Act]" and that such would be "in line with international best practice*".[50] The recommendation is that "*arbitrators have a continuing duty to disclose any circumstances which might reasonably give rise to*

47 *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* [2021] UKSC 48 [75].

48 See, Leila Kazimi, 'The Walking Dead: Double Life of the Kabab-Ji Award' (Kluwer Arbitration Blog, 16 November 2022), https://arbitrationblog.kluwerarbitration.com/2022/11/16/the-walking-dead-double-life-of-the-kabab-ji-award/ (accessed on June 23, 2024).

49 See, Can Eken and Tugce Yalcin, 'An Overview of the English Arbitration Reform Act and Its Implications in Practice' (2024) 45(4) The Company Lawyer 126-128, 127.

50 Final Report, paragraph 3.66.

justifiable doubts as to their impartiality."[51] This reflects the test formulated by the UK Supreme Court in *Halliburton*.[52]

In the *Halliburton* case, the Supreme Court held that in respect of an allegation of apparent bias, the legal test is whether a fair-minded and informed observer (also referred to as the objective observer), having considered the facts, would conclude that there was a real possibility that the tribunal was biased.[53] As such, although the IBA Guidelines on Conflicts of Interest in International Arbitration (2024)[54] and major institutional rules refer to the existence of circumstances that may give rise to doubts as to the arbitrator's impartiality or independence in the eyes of the actual parties concerned (i.e. a subjective analysis), English law adopts an objective approach and is disinterested in what the actual parties' expectations were.[55] The Court also confirmed that the disclosure of material facts or circumstances is a legal duty in English law, as opposed to being merely good arbitral practice, emanating from the arbitrators' duty to act fairly and impartially, and the consequent term implied into contracts between parties and arbitrators that the arbitrator will so act, which implied term cannot be adhered to in circumstances where the arbitrator fails to disclose material circumstances that could justify its removal under the section 24 procedure.[56] The Court held that unless there is disclosure, the parties may often be unaware of matters that could give rise to justifiable doubts about an arbitrator's impartiality and entitle them to a remedy from the court.[57]

For fullness of context, the facts of the Halliburton case are as follows. An arbitrator (Kenneth Rokison QC), who was appointed by the Court following the parties' inability to agree on the chairman of the tribunal, had failed to disclose that he had also been appointed as an arbitrator in two separate but factually related arbitration proceedings concerning the Deepwater Horizon incident that occurred in the Gulf of Mexico in 2010. Having become aware of the arbitrator's appointment in later factually related references, Halliburton filed an application to remove the arbitrator. The basis of the application was section 24(1)(a) of the 1996 Act, which provides that "*A party to arbitral proceedings may … apply to the court to remove an arbitrator on any of the*

51 ibid paragraph 3.75.

52 *Halliburton Co v Chubb Bermuda Insurance Ltd.* [2020] UKSC 48. See also, Doğan Gültutan, "Appear as You Are or Be As You Appear": Sound Advice to Arbitrators Considering Independence and Impartiality Disclosures? A Comparative Analysis Advocating for Uniformity and Addressing Participants' Legitimate Expectations' (2024) 3 International Trade Law & Regulation 133; Daze C. Nga and Peace O. Adeleye, 'The English Supreme Court's Decision in Halliburton v. Chubb: An Examination of the Issues Arising from Arbitrators' Acceptance of Multiple Appointments in Related Arbitrations and Arbitrator's Duty to Disclose' (2022) 88(1) Arbitration: The International Journal of Arbitration, Mediation and Dispute Management, 201 – 218, 202-203.

53 *Halliburton Co v Chubb Bermuda Insurance Ltd.* [2020] UKSC 48 [55]-[62].

54 See, https://www.ibanet.org/document?id=Guidelines-on-Conflicts-of-Interest-in-International-Arbitration-2024 (accessed on June 23, 2024).

55 *Halliburton Co v Chubb Bermuda Insurance Ltd.* [2020] UKSC 48 [72].

56 ibid [76].

57 ibid [78].

following grounds… that circumstances exist that give rise to justifiable doubts as to his impartiality". Halliburton's case was not about actual bias or lack of impartiality of the arbitrator, but about the arbitrator's conduct causing an appearance of bias.[58] The application was refused by the High Court (Popplewell J)[59], granted by the Court of Appeal[60], which overturned the first instance decision, but subsequently refused by the Supreme Court[61], overruling the Court of Appeal.

The Supreme Court held that, at the date of the hearing to remove the arbitrator, a fair-minded and informed observer would not have concluded that circumstances existed that gave rise to justifiable doubts about his impartiality.[62] The Court did hold, however, that the arbitrator was under a legal obligation to disclose his appointment in that particular case and had breached his duty by failing to make the required disclosure.

More recently, in *Africa Sourcing v Société par Actions Simplifiée*, the Commercial Court dismissed a challenge against an arbitrator that was premised on the following grounds: (i) long-term, regular professional contact between the arbitrator and a party's legal representative, including shared membership of a professional organisation.[63] The Court held that the arbitrator was not under a duty to disclose the facts complained of, given that such non-disclosed facts were not sufficiently serious to cause a fair-minded and informed observer to conclude that there was a real possibility of bias (i.e., the common law test for bias). From the Court's perspective, it was important that the dispute arose in a relatively small (cocoa) commodities market, where traders were likely to know each other, and that the trade association's arbitrators, drawn from among its members, were likely to be known to those involved in disputes.

The proposal is welcomed insofar as it codifies the arbitrators' duty of disclosure. However, it is considered that the proposal does not go sufficiently further to ensure full transparency and to address the parties' legitimate expectations. The author has argued elsewhere that the objective test disregards the reasonable expectations of the parties to the arbitration agreement, whose assessment of the presence of independence and/or impartiality concerns may, in certain cases, differ from those of an unconnected third party.[64] This is criticised for ignoring the fact that it is party consent that enables the arbitration process and gives competence to the arbitrator(s) and that, as such, it

58 *H v (1) L, (2) M, (3) N, (4) P* [2017] EWHC 137 (Comm), [3].

59 *H v (1) L, (2) M, (3) N, (4) P* [2017] EWHC 137 (Comm).

60 *Halliburton Company v (1) Chubb Bermuda Insurance Limited, (2) M, (3) N, (4) P* [2018] EWCA Civ 817.

61 *Halliburton Co v Chubb Bermuda Insurance Ltd.* [2020] UKSC 48.

62 ibid.

63 *Africa Sourcing Cameroun Limited and another v Société par Actions Simplifiée (Rockwinds) and another* [2023] EWHC 150 (Comm). See also, *Radisson Hotels APS Denmark v Hayat Otel Işletmeciliği Turizm Yatırım ve Ticaret Anonim Şirketi* [2023] EWHC 892 (Comm).

64 See, Gültutan (n 52).

would not be unreasonable to expect that the rules address the reasonable and legitimate expectations of the enablers of the private process of arbitration, which would logically encompass rules concerning the ultimate arbiters of the relevant dispute. The test for arbitrators' disclosure obligation should therefore not be purely objective based and be sufficiently flexible to permit subjective elements where appropriate and, more importantly, would answer the parties' legitimate expectations, provided such elements are known or should have been known by the arbitrator in question.

Notwithstanding the above, the proposed reform is a step in the right direction in entrenching the obligation to disclose in a legislative provision, helping to instil confidence in the arbitral process and enabling maximum transparency.[65] The reform proposal, if accepted, will help address the current legitimacy criticisms against international arbitration.[66]

C. Arbitrator Immunity (Re: Resignations and Removals)

Another recommendation concerns the arbitrators' immunity from liability. This recommendation has two throngs: (i) a recommendation that arbitrators incur no liability for resignation unless the resignation is proved to be unreasonable and (ii) a recommendation that arbitrators should incur no liability, including costs liability, in respect of an application for their removal, unless the arbitrator has acted in bad faith.[67]

The immunity of arbitrators is currently regulated under section 29 of the 1996 Act, which provides that an "*arbitrator is not liable for anything done or omitted in the discharge or purported discharge of his functions as arbitrator unless the act or omission is shown to have been in bad faith*".[68]

The immunity as currently provided appears on the surface to be widely worded and sufficient to provide arbitrators with blanket protection. However, arbitrators have been held liable in some cases concerning their resignation or application for their removal, prompting the Commission to consider tightening the protection.[69] For

65 See, generally, Gillian Eastwood, 'A Real Danger of Confusion? The English Law Relating to Bias in Arbitrators' in William W. Park (ed), Arbitration International (2001) 17(3) 287–312, 291-292; David Hacking, 'Arbitration is Only as Good as Its Arbitrators', in Stefan Kröll, Loukas A. Mistelis, Perales Viscasillas Maria del Pilar & Vikki M. Rogers (eds), *Liber Amicorum Eric Bergsten – International Arbitration and International Commercial Law: Synergy, Convergence and Evolution* (Kluwer Law International 2011), 223-230; Ali Yeşilırmak, 'Transparency and Stakeholders' Role in the Selection of the Arbitral Tribunal', in Stavros Brekoulakis, Romesh Weeramantry, Lilit Nagapetyan (eds), *Achieving the Arbitration Dream: Liber Amicorum for Professor Julian D.M. Lew KC* (Kluwer Law International, 2023), 285-293.

66 See, Thomas H. Webster, 'Efficiency in Investment Arbitration: Recent Decisions on Preliminary and Costs Issues' (2009) 25(4) Arbitration International 469; David Collins, 'The line of Equilibrium: Improving the Legitimacy of Investment Treaty Arbitration Through the Application of the WTO's General Exceptions" (2016) 32(4) Arbitration International 575; Malcolm Langford, Cosette D. Creamer and Daniel Behn, 'Regime Responsiveness in International Economic Disputes' in Szilard Gaspar-Szilagyi, Daniel Behn and Malcom Langford (eds), *Adjudicating Trade and Investment Disputes: Convergence or Divergence?* (Cambridge University Press 2020), 245 and 267 *et seq*.

67 Final Report, paragraphs 5.3 and 5.4.

68 1996 Act, section 29(1).

69 Final Report, paragraph 5.2.

instance, in *Halliburton*, Lord Hodge (with whom Lords Reed and Lloyd-Jones and Lady Black agreed) explained that "*in cases where the matter is serious but the non-disclosure of that matter, on later examination, does not support the conclusion that there is apparent bias, the arbitrator might, depending on the circumstances, face an order to meet some or all of the costs of the unsuccessful challenger or to bear the costs of his or her own defence*".[70]

In *C Ltd v D*, Hensaw J confirmed that "*section 29 [of the 1996 Act] would not preclude an arbitrator from being ordered to pay costs in relation to a section 24 application [an application to remove the arbitrator] that he had opposed…[, but noted that] costs awards against arbitrators are extremely rare*".[71] The Judge also referred to another (unreported) case[72] in which the judge ordered the arbitrator, who had resisted the application, to pay the costs. The justification for providing arbitrators immunity and shielding them from contractual claims even in circumstances where they fall below the required standard is that it would "*support[] an arbitrator to make robust and impartial decisions without fear that a party will express their disappointment by suing the arbitrator…[and would] support[] the finality of the dispute resolution process by preventing a party who is disappointed with losing the arbitration from bringing further proceedings against the arbitrator*".[73]

The proposed strengthening of arbitrators' immunity is thus applauded. An arbitrator should not be held liable in connection with a resignation or their removal via court application unless such an action is shown to have been unreasonably done or done in bad faith, respectively. The proposed reform successfully strikes a balance between keeping arbitrators answerable to unreasonable or unacceptable conduct, whilst providing them with a sense of security that would enable them to make robust and impartial decisions.

D. Summary Disposal of Claims and Defences

A further proposed reform is the introduction of an express power to summarily dispose claims and defences. This would mirror the English courts' power to grant summary judgments.[74] The Commission has recommended that the 1996 Act provide for an express power for arbitrators to make an award on an issue on a summary

70 *Halliburton Co v Chubb Bermuda Insurance Ltd.* [2020] UKSC 48, per Lord Hodge [111].

71 *C Ltd. v D* [2020] EWHC 1283 (Comm), [58].

72 *Wicketts v Brine Builders & Siederer* [2001] App. L.R. 06/08. See also, Ned Beale, James Lancaster, et al., 'Removing an Arbitrator: Recent Decisions of the English Court on Apparent Bias in International Arbitration', 2016 (34(2) ASA Bulletin, (Association Suisse de l'Arbitrage), 322-341, 328.

73 Final Report, paragraph 5.7.

74 See, Civil Procedure Act 1997, section 1; and Civil Procedure Rules ("CPR"), Part 24. CPR r. 24.3 stipulates that the court "*may give summary judgment against a claimant or defendant on the whole of a claim or on an issue if— (a) it considers that the party has no real prospect of succeeding on the claim, defence or issue; and (b) there is no other compelling reason why the case or issue should be disposed of at a trial.*"

basis if a party has no real prospect of succeeding on that issue, unless the parties agree otherwise.[75] The justification for the proposal is to encourage arbitrators to use summary disposal tools to improve the cost and time efficiency of arbitration.[76]

As the Commission recognised in its report, arbitrators "*probably have an implicit power to use summary disposal*."[77] Therefore, the proposed reform is arguably unnecessary. However, it is agreed that the express recognition of the power under statute may embolden arbitrators to exercise their powers of summary disposal and to summarily dismiss claims or defences that are unworthy of attention during the trial or hearing. There are likely many cases where the claim(s) or defence(s) raised are ripe for summary disposal, but arbitrators refuse to take decisive action to dismiss claim(s) or defence(s) that are unworthy of further consideration.[78] It is only hoped that an express statutory power will encourage arbitrators to use the additional weapon in their armoury and reassure them that doing so will not of itself result in successful challenges to their awards.

E. Court Powers in Support of Arbitral Proceedings and Emergency Arbitration

The final reform proposal to be considered is the proposal to amend the 1996 Act to (i) confirm that powers exercisable by courts in support of arbitral proceedings (as contained in section 44), such as powers to make orders for the preservation of evidence, sale of goods, and appointment of a receiver, may be exercised against third parties[79] and (ii) empower the court to enforce a peremptory order issued by emergency arbitrators.[80] The justification for the former proposed reform is that it would "*bring clarity*" to the law[81]; whilst for the latter is that it "*would support arbitration*".[82]

It is agreed that there should be a mechanism to enable the enforcement of an emergency arbitrator's peremptory order should it not be voluntarily complied with by the relevant party(ies). Otherwise, the procedure would lack any meaningful teeth, and a party would have to wait until the arbitral tribunal is constituted to be able to obtain a similar order from the tribunal and then to seek to enforce the award through the courts. This would be unsatisfactory from both a cost and time perspective. The proposed reform would improve the efficiency and effectiveness of arbitration, and

75 Final Report, paragraph 6.3.

76 ibid paragraph 6.18 *et seq*.

77 ibid paragraph 6.5.

78 See, e.g., Kanaga Dharmananda, David Ryan, Summary Disposal in Arbitration: Still Fair or Agreed to be Fair (2018) 35(1) *Journal of International Arbitration* 31.

79 Final Report, Chapter 7.

80 ibid chapter 8.

81 ibid paragraph 7.25.

82 ibid paragraph 8.39.

therefore deserves support.

The proposal to confirm in the Act that powers exercisable by courts in support of arbitration proceedings may be exercised against third parties is also to be commended. The inability of courts in certain cases to involve and bind third parties can often result in ineffective and inefficient outcomes and prevent fair resolution of disputes. For instance, it may be that a crucial piece of evidence is in a non-party's possession and needs to be adduced in the arbitration for an accurate and fair assessment of the issues. The court must have coercive powers against such third parties to ensure that arbitral proceedings are not derailed or that arbitrators are short-sighted with incomplete information.

F. No Confidentiality Rule

The Law Commission concluded against reforming certain aspects of the English arbitration law for various reasons, one of which deserves special mention and consideration. The Commission advised against introducing a default rule in which arbitration proceedings would be regarded as confidential and consequently imposing a duty of confidentiality on participants. The rationale provided is as follows:

> "*We continue to think that there should not be a default position of confidentiality in all cases of arbitration. We do not think that one size fits all: different default rules can apply in different arbitral contexts. For example, in some types of arbitration, such as investor-state arbitrations, the default already favours transparency. Elsewhere, there is a trend towards transparency, at least in some respects, such as the publication of awards. And there is further debate to be had in other contexts, for example with some public procurement contracts, about the extent to which hearings should be open to public scrutiny. We would be concerned about the longevity of any statutory rule, given this ongoing debate*."[83]

The Commission also noted, as being relevant, the fact that "*arbitral rules reveal a wide variety of approaches to confidentiality, and that foreign legislation does not speak with one voice*".[84]

The conclusion reached was that "*a statutory rule on confidentiality would [not] be sufficiently comprehensive, nuanced or future-proof… [and that] the current approach works well, and that the development of the law of confidentiality is better left to the common law…*"[85]

As the Commission acknowledges, the "*[1996 Act] does not have any provisions on confidentiality*".[86] However, a general duty of confidentiality is imposed under the

83 ibid paragraph 2.2.

84 ibid paragraph 2.3.

85 ibid paragraph 2.25.

86 ibid paragraph 2.1.

common law through implication, which is subject to various exceptions (i.e., doctrine of implied confidentiality).[87] In 1880, Jessel MR explained in *Russell v Russell* that "*[A]s a rule, persons enter into [contracts containing arbitration clauses] with the express view of keeping their quarrels from the public eyes, and of avoiding that discussion in public, which must be a painful one, and which might be an injury even to the successful party to the litigation, and most surely would be to the unsuccessful.*"[88]

In confirming that the implied duty of confidentiality is not absolute, Lawrence Collins LJ in *Emmott* explained the limits to the implied duty as follows:

> "*On the authorities as they now stand, the principal cases in which disclosure will be permissible are these: the first is where there is consent, express or implied; second, where there is an order, or leave of the court (but that does not mean that the court has a general discretion to lift the obligation of confidentiality); third, where it is reasonably necessary for the protection of the legitimate interests of an arbitrating party; fourth, where the interests of justice require disclosure, and also (perhaps) where the public interest requires disclosure*."[89]

The author has argued elsewhere that there are various potential benefits to introducing a statutory rule to apply by default, mirroring the common law position in terms of the proposed content of the rule. Short of re-iterating the position adopted herein, the position advocated[90] is that legislative enshrinement of the rule on confidentiality will provide certainty and clarity to the participants of the arbitration process and address their legitimate expectations.[91] It is clear that confidentiality is highly valued by the arbitration community, with a not insubstantial portion considering it a dealbreaker, and many operating under the assumption that it is applicable despite the absence of an express agreement on the matter.[92] The confidentiality of arbitration is therefore clearly deserving of legislative shielding, and it is unfortunate that the Law Commission has decided to the contrary.

IV. Conclusion

87 See, *Emmott v. Michael Wilson & Partners Ltd.* [2005] Q.B. 207. See also, *Economic Department of City of Moscow v Bankers Trust Co* [2005] Q.B. 207; *Ali Shipping Corporation v Shipyard Trogir* [1999] 1 W.L.R. 314; *Symbion Power LLC v Venco Imtiaz Construction Co* [2017] EWHC 348 (TCC). See also, Darian-Smith and Ghosh, 'The Fruit of the Arbitration Tree: Confidentiality in International Arbitration' (2015) 81(4) The International Journal of Arbitration, Mediation and Dispute Management 360.

88 *Russell v Russell* (1880) 14 Ch. D. 471.

89 *Emmott v Michael Wilson & Partners Ltd* [2008] C.P. Rep. 26 at [107].

90 See, Doğan Gültutan, 'Confidentiality of Arbitrations Under English Law: Sufficiently Sacrosanct to Warrant Legislative Shielding? A Critical Analysis from a Rumian Perspective' (2023) 1 International Trade Law & Regulation 5.

91 Gültutan (n 52) 25.

92 See, e.g., Paul Friedland and Loukas Mistelis, '2010 International Arbitration Survey: Choices in International Arbitration', available at: https://arbitration.qmul.ac.uk/media/arbitration/docs/2010 _InternationalArbitrationSurveyReport.pdf (the QMUL & W&C Survey); Kenneth I Ajibo, 'Confidentiality in International Commercial Arbitration: Assumptions of Implied Duty and a Proposed Solution' (2015) 3(2) Latin American Journal of International Trade Law 337, 339; L.Y. Fortier, 'The Occasionally Unwarranted Assumption of Confidentiality' (1999) 15(2) Arbitration International 131–140; Srishti Kumar and Raghvendra Pratap Singh, 'Transparency and Confidentiality in International Commercial Arbitration' (2020) 86(4) The International Journal of Arbitration, Mediation and Dispute Management 463–481, 470; Hans Bagner, 'Confidentiality—A Fundamental Principle in International Commercial Arbitration?' (2001) 18(2) Journal of International Arbitration 243, 248–249.

The 1996 Act is indeed a "*truly excellent law of arbitration, worthy of international emulation*".[93] Its effectiveness in promoting arbitration, principally through limited court intervention and respect for the autonomy of the parties, has helped London (and the UK) retain its top spot as a destination for international commercial arbitration.[94] However, the world of arbitration is fast-paced, and approaches and attitudes towards the arbitral process are constantly evolving. Laws should keep up with the pace to ensure that the legislative frameworks continue to support and permit renewed practises and ensure maximum effectiveness. The Law Commission's review of the 1996 Act following its twenty-fifth anniversary was therefore well-timed. Indeed, the various reforms recommended confirm that the 1996 Act required revitalisation.

The Law Commission's Final Report and the Arbitration Bill that accompanies it both deserve praise and commendation. If enacted in its current form, the revised English Arbitration Act will help modernise English arbitration law and address the concerns and expectations of the arbitration community. The introduction of a new provision into the statute to provide that an arbitration agreement will, by default, be subject to the laws of the seat of the arbitration will provide for clarity and certainty. This will also help align English law with the laws of other established arbitration jurisdictions. Furthermore, codifying an arbitrator's duty of disclosure will help instil trust and confidence in the arbitral process. Finally, the strengthening of arbitrators' immunity around their resignation and applications for their removal, the introduction of the power of summary disposal, and the clarification of court powers in support of arbitral proceedings being exercisable against third parties and also in support of emergency arbitrations are all developments that are to be greeted with open arms. Strengthening arbitrator immunity and the express recognition of summary disposal powers deserve special mention, for they will embolden arbitrators and enable them to act without fear and worry. The new Arbitration Act will see England continue to enjoy its world-renowned status as a prominent, established centre of arbitration.

That being said, there are missed opportunities. The reform proposals do not go sufficiently far in some respects. For instance, an arbitrator's duty of disclosure should recognise that sometimes the subjective expectations of the parties may need to be catered in the assessment for disclosure. It is difficult to justify a situation in which the arbitrators simply ignore the reasonable and/or legitimate expectations of the parties, whether known or should have been known, when deciding what facts and circumstances to disclose. The process should be as transparent as possible from the perspective of the parties, who are the true enablers of the entire system, to ensure

93 Carbonneau (n 5) 131-132.

94 See, the "*2021 International Arbitration Survey: Adapting Arbitration to a Changing World*" survey carried out by the School of International Arbitration (SIA) of the Queen Mary University of London, https://arbitration.qmul.ac.uk/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.pdf (accessed on June 23, 2024), page 6, which explains that 54% of participants preferred London as the seat of arbitration.

that they retain confidence in the process and the ultimate arbiters of their dispute.

Notwithstanding the above, the contents of the reform proposal are by and large commendable and will undoubtedly enhance the UK's arbitration offering and ensure that the legislative framework continues to support London in maintaining its top spot as a destination for international commercial arbitration for the years to come.

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Bibliography

Legislations

Arbitration Act 1996 (c 23). Full title: An Act to restate and improve the law relating to arbitration pursuant to an arbitration agreement; to make other provision relating to arbitration and arbitration awards; and for connected purposes, passed on 17 June 1996 (Chapter 23).

Civil Procedure Act 1997 (c 12). Full title: An Act to amend the law about civil procedure in England and Wales; and for connected purposes, passed on 27 February 1997 (Chapter 12).

Cases

Africa Sourcing Cameroun Limited and another v Société par Actions Simplifiée (Rockwinds) and another [2023] EWHC 150 (Comm).

Ali Shipping Corporation v Shipyard Trogir [1999] 1 W.L.R. 314.

C Ltd v D [2020] EWHC 1283 (Comm).

David Sterling v Miriam Rand [2019] EWHC 2560 (Ch).

Economic Department of City of Moscow v Bankers Trust Co [2005] Q.B. 207.

Emmott v Michael Wilson & Partners Ltd [2005] Q.B. 207.

Emmott v Michael Wilson & Partners Ltd [2008] C.P. Rep. 26.

Enka Insaat ve Sanayi AS v OOO Insurance Company Chubb [2020] UKSC 38.

Halliburton Company v (1) Chubb Bermuda Insurance Limited, (2) M, (3) N, (4) P [2018] EWCA Civ 817.

Halliburton Co v Chubb Bermuda Insurance Ltd [2020] UKSC 48.

Haven Insurance Co Ltd v EUI Ltd (t/a Elephant Insurance) [2018] EWCA Civ 2494.

Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait) [2020] EWCA Civ 6.

Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait) [2021] UKSC 48.

Radisson Hotels APS Denmark v Hayat Otel Işletmeciliği Turizm Yatırım ve Ticaret Anonim Şirketi [2023] EWHC 892 (Comm).

Russell v Russell (1880) 14 Ch. D. 471.

Symbion Power LLC v Venco Imtiaz Construction Co [2017] EWHC 348 (TCC).

Union of India v Reliance Industries Limited [2022] EWHC 1407 (Comm).

Wicketts v Brine Builders & Siederer [2001] App.L.R. 06/08.

Books and book chapters

Betancourt JC, 'Chapter 19: The Reform of the Arbitration Act 1996', in Gregory Roy Fullelove, Laila Hamzi, et al. (eds), *International Arbitration in England: Perspectives in Times of Change* (Kluwer Law International 2022), 361 – 388.

Born G, *International Arbitration: Law and Practice*, Third Edition (Kluwer Law International 2021).

Eastwood G, 'A Real Danger of Confusion? The English Law Relating to Bias in Arbitrators', in William W. Park (ed), Arbitration International (2001) 17(3) 287-312.

Hacking D, 'Arbitration is Only as Good as Its Arbitrators', in Stefan Kröll, Loukas A. Mistelis, Perales Viscasillas Maria del Pilar & Vikki M. Rogers (eds), *Liber Amicorum Eric Bergsten – International Arbitration and International Commercial Law: Synergy, Convergence and Evolution* (Kluwer Law International 2011), 223-230.

Langford M, Creamer CD and Behn D, 'Regime Responsiveness in International Economic Disputes' in Szilard Gaspar-Szilagyi, Daniel Behn and Malcom Langford (eds), *Adjudicating Trade and Investment Disputes: Convergence or Divergence?* (Cambridge University Press 2020), 245.

Rokison KS, 'Chapter 12: 'Pastures New' (Review of Arbitration Act 1996)', in Julian D.M. Lew and Loukas A. Mistelis (eds), *Arbitration Insights: Twenty Years of the Annual Lecture of the School of International Arbitration, Sponsored by Freshfields Bruckhaus Deringer, International Arbitration Law Library, Volume 16* (Kluwer Law International 2007), 213 – 222.

Sheppard AW, 'English Arbitration Act (Chapter 23)', in Loukas A. Mistelis (ed), *Concise International Arbitration* (Second Edition), (Kluwer Law International 2015), 977 – 980.

Yeşilırmak A, 'Transparency and Stakeholders' Role in the Selection of the Arbitral Tribunal', in Stavros Brekoulakis, Romesh Weeramantry, Lilit Nagapetyan (Eds), *Achieving the Arbitration Dream: Liber Amicorum for Professor Julian D.M. Lew KC* (Kluwer Law International, 2023), 285-293.

Journal articles

Ajibo KI, 'Confidentiality in International Commercial Arbitration: Assumptions of Implied Duty and a Proposed Solution' (2015) 3(2) Latin American Journal of International Trade Law 337.

Bagner H, 'Confidentiality—A Fundamental Principle in International Commercial Arbitration?' (2001) 18(2) Journal of International Arbitration 243.

Beale N *et al.*, 'Removing an Arbitrator: Recent Decisions of the English Court on Apparent Bias in International Arbitration', 2016 (34(2) ASA Bulletin, (Association Suisse de l'Arbitrage), 322-341.

Carbonneau TE, 'A Comment on the 1996 United Kingdom Arbitration Act' (1998) 22 Tulane Maritime Law Journal 131.

Chenu V, 'The Arbitration Act 1996: One Year On: The New Provisions Under the Microscope and Recent Cases' (1998) 6(5) International Insurance Law Review 165.

Collins D, 'The Line of Equilibrium: Improving the Legitimacy of Investment Treaty Arbitration Through the Application of the WTO's General Exceptions' (2016) 32(4) Arbitration International 575.

Darian-Smith M and Ghosh V, 'The Fruit of the Arbitration Tree: Confidentiality in International Arbitration' (2015) 81(4) The International Journal of Arbitration, Mediation and Dispute

Management 360.

Davidson FP, 'The new Arbitration Act - a Model Law?' (1997) Journal of Business Law 101-129.

Dharmananda K and Ryan D, 'Summary Disposal in Arbitration: Still Fair or Agreed to be Fair' (2018) 35(1) Journal of International Arbitration 31.

Eken C and Yalcin T, 'An overview of the English Arbitration Reform Act and Its Implications in Practice' (2024) 45(4) The Company Lawyer 126.

Fortier LY, 'The Occasionally Unwarranted Assumption of Confidentiality' (1999) 15(2) Arbitration International 131–140.

Gicquello M, 'Reviewing the Arbitration Act 1996: A Difficult Exercise?' (2023) 2(4) Amicus Curiae, Series 2 391.

Gültutan D, "Appear as You Are or Be As You Appear": Sound Advice to Arbitrators Considering Independence and Impartiality Disclosures? A Comparative Analysis Advocating for Uniformity and Addressing Participants' Legitimate Expectations' (2024) 3 International Trade Law & Regulation 133.

Gültutan D, 'Confidentiality of Arbitrations Under English Law: Sufficiently Sacrosanct to Warrant Legislative Shielding? A Critical Analysis from a Rumian Perspective' (2023) 1 International Trade Law & Regulation 5.

Kazimi L, 'The Walking Dead: Double Life of the Kabab-Ji Award' (Kluwer Arbitration Blog, 16 November 2022).

Kumar S and Singh RP, 'Transparency and Confidentiality in International Commercial Arbitration' (2020) 86(4) The International Journal of Arbitration, Mediation and Dispute Management 463–481.

Nga DC and Adeleye PO, 'The English Supreme Court's Decision in Halliburton v. Chubb: An Examination of the Issues Arising from Arbitrators' Acceptance of Multiple Appointments in Related Arbitrations and Arbitrator's Duty to Disclose' (2022) 88(1) Arbitration: The International Journal of Arbitration, Mediation and Dispute Management, 201-218.

Scherer M and Jensen O, 'Towards a Harmonized Theory of the Law Governing the Arbitration Agreement' (2021) 10(4) Indian Journal of Arbitration Law 1.

Teomete Yalabik F, 'The Impact of the Seat of Arbitration on Judicial-Interference: Do Sections 67, 68 and 69 of the English Arbitration Act 1996 Regarding Challenges of Awards Make London an Attractive Hub?' (2021) 70 Annales de la Faculté de Droit d'Istanbul 253-272.

Webster TH, 'Efficiency in Investment Arbitration: Recent Decisions on Preliminary and Costs Issues' (2009) 25(4) Arbitration International 469.

Other sources

Business and Property Courts, The Commercial Court Report 2022-2023 (Including the Admiralty Court Report), February 2024.

Fanou M, 'Adapting Arbitration to a Changing World', Joint Survey by the School of International Arbitration (SIA) of the Queen Mary University of London and White & Case LLP (2021).

Friedland P and Mistelis L, '2010 International Arbitration Survey: Choices in International Arbitration' School of International Arbitration (SIA) of the Queen Mary University of London and White & Case LLP (2010).

IBA Guidelines on Conflicts of Interest in International Arbitration (2024).

Law Commissions Act 1965 (c 22). Full title: An Act to provide for the constitution of Commissions for the reform of the law, passed on 15 June 1965 (Chapter 22).

Law Commission's "Review of the Arbitration Act 1996: Final report and Bill" (Law Com No 413) dated 6 September 2023.

UNCITRAL Model Law on International Commercial Arbitration of 1985 (as amended in 2006).