MC MS Blog

Thoughts on the consultation amending the Arbitration Act 1996

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I've been looking at the *Law Commission's consultation* on proposed changes to the *Arbitration Act 1996* (AA 1996). The AA 1996 has been around some 25 years, which is about the same length of time that I've been resolving disputes. In fact, the very first case I worked on was a pre-Act arbitration that had started some years before, and rumbled on for several more. Therefore, I don't really remember life without the AA 1996, just like it is really hard these days to remember life without the Construction Act 1996!

Consultation on proposed changes to Arbitration Act 1996

The Law Commission's consultation on *reforming the Arbitration Act 1996* started last month. Alongside the *consultation document* (which runs to 159 pages), the Law Commission also published a more user-friendly *summary* (it's only 15 pages).

For those unfamiliar with the consultation, I suggest starting with the summary document. It is much easier to get an understanding of what the Law Commission is asking, before diving into the more extensive detail in the consultation itself.

What follows is just a brief look at some of the issues in the consultation.

Confidentiality

This is about the:

"… 'secrecy' of information, and who has access to it, and for what purposes."

In the context of an arbitration, *confidentiality* might attach to "things said in an arbitral hearing, or to documents produced to support a claim" and it would "restrict who could repeat those things, and to whom, and why". The AA 1996 does not contain any provisions about confidentiality in arbitration, and the Law Commission has concluded that it should not do so. Instead, the law "is better left to be developed by the courts".

Independence and disclosure

In broad terms, independence mean arbitrators should have no connection to the parties or the

dispute. The AA 1996 does not impose a duty of independence on arbitrators (although some arbitral rules do) and the Law Commission has concluded that it should not. The Law Commission thinks "what matters most is impartiality", which is dealt with in *section 33*. Also, that:

"… if an arbitrator is impartial, it does not matter if they are not perfectly independent – as long as any connections are disclosed to the parties, so that the parties can consider the matter for themselves. It is an old but vital adage that justice must be done and be seen to be done. Arbitrators must be impartial and be seen to be impartial.

The case law already recognises that an arbitrator must be free from apparent bias: whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."

The Law Commission acknowledges that "it is rarely possible for an arbitrator to be free of any connections to the parties or the subject-matter of the dispute" and that "some arbitrators are chosen precisely because of their immersive experience in a
particular field". To address possible connections and impartiality, and to give parties confidence in that impartiality, the Law Commission is proposing that arbitrators have an on-going duty of disclosure, and the AA 1996 is amended so that the case law requiring an arbitrator to make disclosures is codified, and the duty is a continuing one to:

"…disclose any circumstances which might reasonably give rise to justifiable doubts as to their impartiality".

Discrimination

There is a proposal to prevent discrimination in the appointment of an arbitrator. The Law Commission notes that while diversity of arbitral appointments has improved, women are still around three times less likely to be appointed as arbitrators than men.

Immunity of arbitrators

Arbitrators already have immunity (under section 29), unless they act in bad faith, but this is not a blanket immunity (two exceptions are cited: when an arbitrator resigns and when a party makes an application to court which impugns an arbitrator).

The Law Commission is looking to strengthen the immunity of arbitrators:

"… it is important to uphold the immunity of arbitrators. It supports the finality of the dispute resolution process, in that it prevents parties who are disappointed by the arbitral proceedings from pursuing further satellite litigation against the arbitrator. It also supports an arbitrator in acting impartially. An arbitrator should feel able to make appropriate decisions without the fear that a disapproving party might seek to cow them into submission by threats of challenge which incur personal liability."

Summary disposal of issues that lack merit

The Law Commission is proposing that arbitrators should have the right to give summary judgment (just like a court does) when an issue has no real prospect of success or is "manifestly without merit". This goes beyond arbitrators' existing powers to adopt procedures that avoid unnecessary delay and expense (*section 33(1)(b)*).

Section 44 and orders against third parties

There are issues surrounding whether a *court can make an order* against a third party, and so the Law

Commission asks whether section 44 should be amended to make it clear that orders can be made against third parties.

Appeals on a point of law

A party to arbitral proceedings can appeal to the court on a question of law arising out of an award (*section 69, AA 1996*), and the Law Commission proposes no changes to this provision.

Modern technology

The Law Commission has concluded that the AA 1996 is compatible with the use of modern technology. For example, it is possible to have:

"… the examination of witnesses remotely (that is, through telecommunication technology); holding hearings remotely; electronic communication; electronic documentation; the presentation of evidence and argument electronically; electronic awards; signing of awards electronically or with a cryptographic key; and notifying awards electronically."

However, the consultation asks whether an arbitral tribunal should be empowered to order remote hearings and the use of electronic documentation.

Climate change

There are no specific proposal regarding climate change measures, but the consultation acknowledges that:

"The arbitration community can contribute to addressing climate change, in particular by reducing travel, especially air travel and, to a lesser extent, reducing waste (such as paper waste in terms of paper filings and perhaps even the use of disposable coffee cups). These are also actions highlighted by the Campaign for Greener Arbitrations. Thus, in light of climate change, remote hearings and electronic documentation become ever more relevant."

Confidentiality and adjudication

I was particularly interested in the points raised on confidentiality. As the Law Commission notes:

"The existing default position – that arbitrations seated in England and Wales are, by default, private and confidential – is strongly supported by many users of arbitration. An obligation of confidentiality might be an express term of the arbitration agreement, or a term implied by law, or it might arise in equity, and 'privacy' can also be protected in tort. But confidentiality cannot be an absolute obligation. It must be subject to exceptions. For example, an arbitral party seeking to enforce an award must be able to disclose it. The difficulty lies not in stating the default rule, but in articulating the exceptions."

Confidentiality is something that I've pondered regarding adjudication, and some of you may recall it is something I've *discussed before*, after listening to a talk on confidentiality by Sir Vivian Ramsey back in 2010.

At the time, I noted that the *Construction Act 1996* does not mention confidentiality and the only mention in *Part I of the Scheme for Construction Contracts 1998* relates to a party being able to request that information or documents it discloses as part of the adjudication process remain confidential and are not disclosed to "any other person", unless it is necessary as part of the adjudication (paragraph 18). I noted that only the TeCSA adjudication rules contained a confidentiality clause, and wondered whether that meant that any statutory adjudication, or adjudication based on the Scheme, would not be subject to a statutory duty of privacy or confidentiality (unless it could be

said that there was a common law duty, analogous to the duty in arbitration).

At the time, I also wondered if we'd see an increase in confidentiality agreements in adjudication, which Jonathan *told us* a few years later was not happening. Jonathan also mentioned that the *government's consultation* on amending the Scheme asked respondents for their comments on the possibility of making adjudication confidential, but nothing came of it. However, he was a big fan of adjudication remaining confidential.

Fast forward to 2022, and most adjudication rules remain silent or only make things confidential if the parties require or specify it. I agree with Jonathan that confidentiality is important, but do sometimes wonder if there is room for adjudicators' decisions to be published. Certainly, it is arguable that publication would make the parties, experts and adjudicators more accountable, it would call out bad behaviour and increase the quality of adjudicators and their decisions. The arguments against are that there is no precedential value, it goes against the parties' wishes and could undermine the process by making it less attractive.

I think I might stay on the fence on this point a little while longer, and would certainly welcome a debate/moot on the subject at a future Society of Construction Law or Adjudication Society event so I could ask the audience what they think.

Back to the consultation…

As a practicing arbitrator, I am really interested in this development, and will be equally interested in the outcome, when that is published next year (although I do wonder how long it will take before we actually see any amendments to the AA 1996 in force).

For those of you that are interested as well, there are 38 questions set out in chapter 12 of the consultation, and you have until 15 December 2022 to answer them. As the Law Commission notes:

"This anniversary presents a good opportunity to revisit the Act, to ensure that it remains state of the art, so that it provides an excellent basis for domestic arbitration, and continues to support London's world-leading role in international arbitration."

The future is in your hands!

MATTHEW MOLLOY