Reviewing the Arbitration Act 1996: A Difficult Exercise?

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Abstract

The (English) Arbitration Act 1996 is currently under review by the Law Commission as it turns 27 this year. This article analyses its Consultation Paper released in September 2022, and which contains preliminary recommendations for an update of the Arbitration Act. This analysis reveals that some issues considered by the Law Commission are not new since they had already been identified by the Departmental Advisory Committee on Arbitration Law prior to the adoption of the Arbitration Act 1996. In fact, some of these concerns were unable to be settled back in the 1990s, and still are to some extent 27 years later. For other issues, however, the Law Commission attempts to draw on recent developments in arbitral practice and contemporary challenges (such as climate change and technological advances) though at times failing to integrate them in an updated Act.

Keywords: English arbitration; international arbitration; Arbitration Act 1996; Law Commission's Review of Arbitration Act.

[A] INTRODUCTION

Arbitration—both domestic and international—has so far been one of the (if not *the*) most popular out-of-court mechanisms for dispute resolution. With its promises of neutrality, confidentiality, finality, effectiveness, expertise, enforcement and party-appointment of arbitrators, disputing parties increasingly chose arbitration as an alternative to litigation (Born 2014; Gicquello 2020). Despite arbitration's promises and popularity, it has, however, been facing mounting criticisms since at least a decade. While these have been more vocal and outspoken about international investment arbitration with concerns about its

legitimacy (Franck 2005), others rather address the framework, design, of arbitration as a whole. For example, William Park once famously compared arbitration to a shoe-repair shop where you can only get two out of the following three options: fast service, low price, and high quality (Park 2010). Other (more targeted) criticisms have rather pointed to the lack of transparency of arbitration and the (potential) partisanship of arbitrators to name a few.

Arbitration is, however, very much still alive and here to stay, alone or in combination with another alternative dispute resolution (ADR) mechanism such as mediation. The 2021 International Arbitration Survey conducted by Queen Mary University of London (QMUL) and White Case indeed found that arbitration is 'the preferred method of resolving cross-border disputes for 90% of respondents' (QMUL & White Case 2021: 2). This is especially true in jurisdictions which are already competing to be the most popular destination for arbitrations. In Europe, England is one such arbitration hub with London and English law each being among the most popular seats or laws chosen by the parties for the conduct of their arbitrations, alongside Paris and Geneva (QMUL & White Case 2021). To illustrate, the London Court of International Arbitration (LCIA) had over 85% of its arbitrations seated in London in 2021 (LCIA 2021); while for arbitrations instructed by the International Chamber of Commerce (ICC) in 2020, English law remained the most popular choice and England was a top four destination as an arbitration seat following Switzerland, France and the United States (ICC 2020).[1]

Arbitration laws are therefore one element to take into consideration when parties draft their arbitration clauses. Indeed, although arbitration does give them more powers compared to litigation, laws are still needed to regulate the arbitral process. Furthermore, what popular arbitration jurisdictions have in common—such as France, England and Switzerland—is their friendliness towards arbitration with laws and courts supporting arbitral tribunals for example. Countries are therefore competing on the arbitration market to be the 'friendliest' towards arbitration and potentially adapt to changes. However, while France updated its 1981 arbitration law in 2011 and Switzerland its 1989 arbitration law in 2021, England has not yet updated its Arbitration Act 1996.[2]

It is therefore not surprising that for the 25th anniversary of the Arbitration Act 1996, the United Kingdom (UK) Ministry of Justice

[1] With the 2021 International Arbitration Survey from QMUL and White Case identifying London, Singapore, Paris, Hong-Kong, and Geneva as the five most preferred seats for arbitration.

[2] Note that the UK or English Arbitration Act 1996 is not applicable to Scotland, but only to England Wales and Northern Ireland.

commissioned the Law Commission to undertake a review of the Act (Law Commission 2022a). However, because it is already very competitive domestically and internationally, the Law Commission does not intend to undertake an entire reform of this Arbitration Act. Instead:

> 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 (Law Commission 2022a:1; 2022b).

After a comprehensive review of the Arbitration Act 1996, which started in January 2022 and involved preliminary discussions with stakeholders in arbitration, the Law Commission released a Consultation Paper in September 2022 including provisional reform proposals (Law Commission 2022a). Highlighting a number of debated issues in the world of arbitration and how best to respond to these, the Law Commission thus launched its consultation from 22 September 2022 to 15 December 2022 in order 'to inform the final recommendations' (Law Commission 2022b).

This article analyses this Consultation Paper and the provisional recommendations to keep the Arbitration Act 1996 up to date with current practices, developments and debates in arbitration. Before undertaking this evaluation, it first considers the adoption of the Arbitration Act 1996. It then addresses the impact of this new legislation on arbitration in England—both domestic and international—and whether a review of the Act by the Law Commission is now really necessary. Against this background, the paper evaluates the Consultation Paper of the Law Commission. This analysis reveals that some issues identified by the Law Commission are not new since they had already been extensively discussed by the Departmental Advisory Committee on Arbitration (DAC) prior to the adoption of the Arbitration Act 1996. In fact, some of these concerns were unable to be resolved back in the 1990s and still are, to some extent, today. Nevertheless, for other issues, the Law Commission attempts to draw on recent developments in arbitral practice and contemporary challenges (such as climate change and technological progress), though at times failing to integrate them in an updated Act.

[B] THE ARBITRATION ACT 1996

Although London and English laws are now both prime choices for the conduct of arbitrations, this has not always been the case. This status indeed owes much to the Arbitration Act 1996 which has been praised as being 'remarkable, highly accessible, comprehensive, thorough, cogent,

coherent, cohesive, outstanding, masterful, lucid, excellent, and worthy of international emulation' (Carbonneau 1998: 131-132, 154). Indeed, the Arbitration Act 1996 marked a profound departure from previous arbitration laws—here encompassing the Arbitration Acts 1950, 1975, and 1979. Previous laws, which led some to assert that suggesting London as an arbitration venue back in the 1970s could have led an international lawyer to be accused of 'professional negligence' (Paulsson 2007: 478).

This unattractiveness of arbitration in England, and of English arbitration laws, was mainly due to the hostility of the judiciary towards arbitration, in turn leading to a high level of judicial intervention in the arbitral process (Chukwumerije 1999; Reid 2004). In turn, this meant that the benefits of arbitration—highlighted in the introduction—were greatly impeded upon. For example, the principles of party autonomy, finality and effectiveness (both in terms of times and costs) were undermined by such distrust towards arbitration and associated court activity. Yet, this high level of court intervention was not only explicitly allowed by the legislative framework at the time, but was also fed by the lack of a clear philosophy behind the practice of arbitration in England (Chukwumerije 1999). Lack of clarity, which then further fed the inherent judicial suspicion and hostility towards arbitration, manifested through increased judicial activity in arbitrations—both in relation to the arbitral process and outcomes (Chukwumerije 1999; Reid 2004).

However, the competitiveness and associated popularity of arbitration depend upon the parties' satisfaction with the process (Yu 2002). If arbitration were to become a replication of court processes—which parties are trying to avoid by choosing arbitration—or if it were to be burdened by additional steps in courts, in turn leading to additional costs and delays, arbitration would then be unlikely to take off in a given jurisdiction. These concerns—or the unfitness of English arbitration laws—were picked up by the DAC in its reports published in 1989, 1995 and 1996. As such, it first recommended in 1989 that there should be 'a new and improved Arbitration Act for England, Wales, and Northern Ireland' (DAC 1996: 276) adding in an interim report in 1995 that:

> what is called for is much more along the lines of a restatement of the law, in clear and 'user-friendly' language, following, as far as possible, the structure and spirit of the Model Law, rather than simply a classic exercise in consolidation (DAC 1996: 276).

From this recommendation was born the Arbitration Act 1996, which applies to both domestic and international arbitrations. This Act has been deemed 'innovative' in that it clearly defines the philosophy behind the Act and of arbitration in England, thus leaving no room for judicial

discretion as to when the courts can/should intervene in an arbitration: discretion, which usually responded to a sentiment of distrust or hostility towards arbitration as mentioned earlier (Chukwumerije 1999).[3] This clear philosophy, liberalization of arbitration, is clearly set out in the very first section of the Arbitration Act 1996, which simply states, in plain and intelligible English, the 'general principles' of the Act. This provision directly responds to the first two features identified by the DAC in 1989 that the new law of arbitration should have: 'a statement in statutory form of the more important principles of the English law of arbitration … limited to those principles whose existence and effect are uncontroversial' (DAC 1996: 276). Section 1 of the Act therefore states:

> The provisions of this Part are founded on the following principles, and shall be construed accordingly—(a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense; (b) the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest; (c) in matters governed by this Part the court should not intervene except as provided by this Part (Arbitration Act 1996, section 1).

In a nutshell, this provision now explicitly and clearly identifies three principles underpinning arbitration in England and beyond. These are: the recognition of arbitration as an alternative to court processes; party autonomy; and judicial non-intervention except for instances explicitly provided for in the Act. While the first principle was not subject to much controversy in previous Acts—since arbitration did already exist as an alternative to litigation, yet with a high level of judicial intervention—the same did not hold true when it comes to party autonomy and limited (or non-)judicial intervention (Chukwumerije 1999). Following the adoption of the Arbitration Act in 1996, however, a balance is now deemed achieved between these two principles; that is to say between the interests of the parties and the interests of states, which could sometimes be conflicting (Chukwumerije 1999).[4] The wishes of the parties are indeed not absolute since they are constrained by elements of public policy and mandatory rules in the Arbitration Act. Furthermore, the state does have to regulate arbitration in order to both 'provide assistance to the arbitral process' and 'secure the fairness and legitimacy of the system' through its courts (Chukwumerije 1999: 177). Judicial intervention is therefore widely accepted when it is supportive of arbitration, but not so much when it is used to weaken the process or its finality. As Toby Landau

[3] For example, Alan Reid mentions that 'English judges were required to be re-educated to work under a new legal regime in which they would adopt a less interventionist role' (Reid 2004: 230).

[4] For a detailed review of how this balance was achieved with the Arbitration Act 1996, see Chukwumerije 1999.

nicely summarized, the drafters' desires in the 1990s were to 'cut back the powers of the court as far as possible, and to ensure that the court's powers were only of a nature as to, and only exercised in such a way as to, support arbitration, not interfere with it' (Landau 1996: 159).

The limited role of courts in arbitration proceedings is itself a core principle of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (the Model Law) adopted in 1985. Although, the Arbitration Act did not adopt this Model Law following the DAC's recommendation, it has been influenced by it both in terms of structure and content. As Alan Reid noted, the differences between the Model Law and the English Arbitration Act are actually 'more imagined than real, more procedural than substantive' with 'both systems attempt[ing] to reduce the level of judicial intervention in the arbitral process' (Reid 2004: 227). One difference being, for example, that there are more recognized circumstances in the Arbitration Act 1996 allowing for judicial interventions, such as the controversial section 69 which allows for appeals of arbitral awards on a point of law.

[C] A NEED FOR REVIEW? ARBITRATION IN ENGLAND POST-1996

Although praised, the Arbitration Act 1996 is not perfect. There have been criticisms on some of its provisions—such as the aforementioned section 69. As far as this provision is concerned, however, these concerns could be mitigated given the strict conditions of its application, its insignificant use by the disputing parties, and its non-mandatory character (Law Commission 2022a).[5]

Furthermore, the Arbitration Act 1996 does not address all aspects related to an arbitration. These intended *gaps* are then addressed by arbitral institutions and case law, in turn allowing for some flexibility. The role of UK courts in this endeavour—supportive rather than opposed to arbitration—has recently been confirmed, in 2020, by the UK Supreme Court in the *Halliburton v Chubb* (2020) case, acknowledging that 'The 1996 Act is not a complete code of the law of arbitration, but allows judges to develop the common law in areas which the Act does not address' (para 47). One could argue, however, that given this plurality of actors—legislature, judiciary and arbitral institutions—time has come to codify

[5] Less than 1% of arbitration cases seated in England lead to an application to courts under section 69 of the Arbitration Act 1996 (Law Commission 2022a).

undebated and established arbitration practices into a single statute. A review of the Arbitration Act 1996 could indeed build on the past 27 years and be an opportunity to do just that, hence bringing some (more) clarity.

So far, the Arbitration Act 1996 has been working rather well if one considers the status of London and English law in the world of (cross-border) arbitrations. As mentioned briefly in the introduction, English arbitration law and London, as an arbitration seat for cross-border disputes, have consistently been favourites and topped the rankings of major arbitral institutions. This is certainly true of the LCIA—and one might say not surprising given its headquarters are based in London—but also of others such as the ICC (ICC 2020). This ongoing popularity of London and English arbitration law has similarly transpired in surveys involving arbitration practitioners and respondents (QMUL & White Case 2021).

Given the established popularity and dominance of the Arbitration Act 1996 in the arbitration landscape,[6] the question is: does this Act really need an update? Could we just not continue to rely on the existing relationship/dialogue between the law (with its mandatory and non-mandatory provisions), the courts, arbitral institutions, tribunals and disputing parties? With, for example, arbitral institutions drafting model clauses to bypass the non-mandatory elements or default choice of the Arbitration Act (such as section 69). After all, the Arbitration Act 1996 seems to have already fulfilled the DAC's desires that 'England should have the best possible arbitration statute' (Steyn 1993: 8), hence a change may not necessarily be called for.

Certainly, no statute can be perfect. But, legislation should ideally be adapted to a changing world. One could therefore wonder whether this review of the Arbitration Act—leading to light-touch amendments of the Act and not to a complete reform or revolution—will indeed allow for both longstanding/debated issues to be set in statute, and for new challenges to be acknowledged and dealt with appropriately. Considering the Consultation Paper published by the Law Commission in September 2022, in some respects, the answer to this question unfortunately appears to be a no; unless some of the policy recommendations are updated based on the responses received as part of its consultations with stakeholders in arbitration.

[6] With this success itself acknowledged by the Law Commission as a prelude to its consultation, mentioning the Chartered Institute of Arbitrators having its headquarters in London with 17,000 registered members and the value of arbitration for the British economy: worth at least £2.5 billion a year (Law Commission 2022a).

[D] THE LAW COMMISSION'S CONSULTATION PAPER

This review of the Arbitration Act commissioned by the UK Ministry of Justice is welcome in order to ensure that 'the Act remains state of the art' (Law Commission 2022a: 1). However, some preliminary recommendations suggested by the Law Commission have already met criticisms from academics and practitioners alike. This part will briefly address these after a brief overview of this Consultation Paper.

Overview

The Consultation Paper issued in September 2022 is a comprehensive and carefully drafted review of the Arbitration Act 1996 by the Law Commission. After some preliminary discussions with users of the Act, this 150-page document—which submits questions to stakeholders in arbitration—does provide a clear view as to what the current debates and recent developments in arbitration are, and which may be worth tackling should the Act be updated (Law Commission 2022a).

The Consultation Paper further characterizes these debates and developments as either worthy of inquiry, and thereafter of amendments, or not. As such, debates/criticisms regarding the privacy and confidentiality of arbitrations, the impartiality and independence of arbitrators, their appointment and immunity, arbitral tribunal's powers for frivolous claims as well as courts' powers in support of arbitration, challenges to a tribunal's jurisdiction under section 67 and appeals on a point of law under section 69 were all identified as main issues by the Law Commission (2022a). For these, it therefore conducted a comprehensive review providing some background, by reviewing case law and some practices of foreign jurisdictions and arbitral institutions for example, so as to get the bigger picture to recommend either amendments or keeping the *status quo*. Alongside these main issues addressed in detail, the Law Commission also recommended small changes for a number of provisions in the Arbitration Act.[7]

Finally, the preliminary discussions and submissions which fed this initial review also identified 'other issues' which have not been shortlisted by the Law Commission for further consideration (Law Commission 2022a: 8). While some of these may indeed not be worthy of further interest, it is not as clear-cut for others. Therefore, early commentary on and public responses to this Consultation Paper have already challenged

[7] Summarized in chapter 10 of the Consultation Paper.

some recommendations to not investigate further. The law applicable to the arbitration agreement is one such contentious issue that has been dismissed by the Law Commission due to recent case law from the UK Supreme Court in *Enka v Chubb* (2020). Furthermore, not only has the stance of the Law Commission been criticized as to these *smaller* issues, but similarly as to issues which it addressed extensively in the review. This is, for example, the case of the debates pertaining to the confidentiality of arbitration and to challenges before state courts through sections 67 and 69, which were already controversial issues identified by the DAC in the 1990s (DAC 1996). One could thus wonder why these issues that were unable to be solved in the 1990s when drafting the Act could/would potentially be solvable now.

Controversial issues: same old, same old?

One such issue already considered by the DAC at the time of the drafting of the Arbitration Act 1996, and now similarly brought back to the attention of the Law Commission, is confidentiality (DAC 1996; Law Commission 2022a). The confidentiality of arbitrations is one promise of the process, which proceeds behind closed doors and without the publication of the decisions as opposed to what happens in courts. While confidentiality is a valued characteristic of arbitration which has repeatedly been mentioned by the parties in arbitration surveys (QMUL & White Case 2015; QMUL & White Case 2018), the Arbitration Act 1996 is silent on confidentiality. The confidentiality of arbitration is instead implied, and parties are also free to agree to confidentiality expressly—in their arbitration agreement or by choosing a set of arbitration rules, for example. Although there is an implied duty/obligation of confidentiality, this is not absolute either since there are exceptions to this principle (DAC 1996; Law Commission 2022a).[8]

The question put to the Law Commission—as it was to the DAC in the 1990s—is whether the Arbitration Act should codify a duty of confidentiality with some exceptions carefully spelled out. Back in the 1990s, the answer to this question had been a carefully considered no: settling instead on an implied duty of confidentiality (DAC 1996). Twenty-five years later, the Law Commission reached the same conclusion following the same reasoning despite some arbitration laws having now

[8] This is a mere example of the dialogue between the law and the courts, where the latter are asked to fill gaps in the former as mentioned in the *Halliburton* case; and as further shown below for other issues on which the Arbitration Act similarly stayed silent. Issues, which recently were brought to the attention of the UK Supreme Court (*Halliburton v Chubb* and *Enka v Chubb* cases).

codified such a duty.[9] Both the DAC and the Law Commission thus concluded that a codification would indeed entail more disadvantages than advantages for the conduct of arbitrations in England. In the DAC's words in 1996: 'It would be extremely harmful to English arbitration if any statutory statement of general principles in this area impeded the commercial good-sense of current practices in English arbitration' (DAC 1996: 279). This was because principles usually have exceptions—and the formulation of these is a difficult enterprise which is better left to the courts. This was clearly articulated in paragraph 2.45 of the Law Commission's Consultation Paper (2022a):

> The law of confidentiality is complex, fact-sensitive, and in the context of arbitration, a matter of ongoing debate. In such circumstances, there is a significant practical advantage in relying on the courts' ability to develop the law on a case-by-case basis. Far from being a weakness, we consider it one of the strengths of arbitration law in England and Wales that confidentiality is not codified.

The confidentiality of arbitrations is therefore one example that bringing clarity through codification, at the expense of flexibility, is not always welcome. Instead, keeping the *status quo*—currently consisting in a dialogue between the law, the courts, arbitral institutions, and the parties—is at times preferable.[10]

Another issue that has also been the object of discussions by both the DAC back in the 1990s and now the Law Commission is the controversial section 69 of the Arbitration Act, which confers a right to appeal an arbitral award on a point of law. This provision is directly challenging the finality of arbitration and is therefore nowhere to be found in the Model Law, which the UK decided not to adopt on recommendation of the DAC in 1989 (DAC 1996). Yet, here too, in considering whether this provision needs to be reformed, the Law Commission decided to keep the *status quo* despite recognizing the existence of conflicting camps on this issue: one arguing for section 69 to be repealed, the other arguing for its liberalization (Law Commission 2022a).

To reach this conclusion, the Law Commission put great emphasis on the fact that section 69 is, after all, a default, non-mandatory, provision of the Arbitration Act 1996; meaning that the parties are free to contract out of it for their arbitration and have already done so. Because of this, this provision already achieves a compromise between two (laudable)

[9] See, for example, the Scottish Arbitration Act 2010.

[10] Though not always, as seen below with issues regarding disclosure from arbitrators and the law applicable to the arbitration agreement also considered by the Law Commission and recently the UK Supreme Court (*Enka v Chubb* and *Halliburton v Chubb*).

motivations—a consistent application of the law and the finality of arbitral awards, hence not calling for its repeal nor expansion (Law Commission 2022a). This was echoed by the General Council of the Bar of England and Wales in its response to the Law Commission's consultation and which expressed its strong opposition 'to a default provision which removed the right of appeal on a point of law' since section 69 already 'strikes a broadly appropriate balance' (2022: 10).

Although there seems to be a general agreement as to the fate of section 69 so far, the same does not hold true for the reform of section 67 of the Arbitration Act 1996. This provision allows for the challenge of an award on the ground that the arbitral tribunal lacked substantive jurisdiction. The contentious issue raised by the Law Commission here is whether this challenge should be by way of a rehearing—as provided by section 67—or by way of appeal when the party challenging the jurisdiction of the tribunal has already participated in the arbitration while raising a jurisdictional objection. This latter position is currently the one favoured by the Law Commission.

To get to this recommendation, the Law Commission considered that allowing a party which has already raised a jurisdictional objection in arbitral proceedings they have participated in entails both additional costs and delays through repetition, and concerns of fairness (Law Commission 2022a). However, these arguments have already been refuted by academics and practitioners, who instead contend that such arguments are 'significantly overstated' (Members of Brick Court Chambers 2022: 4) and 'minor' compared to the arguments in favour of keeping the *status quo*, which are 'overwhelming, both from a theoretical and a pragmatic perspective' (Grierson 2022: 769).[11] Jacob Grierson, for example, considers that the proposed change of section 67 'risks seriously damaging the legitimacy of arbitration by allowing illegitimate arbitrations to go unchecked', while consent is at the cornerstone of arbitration (Grierson 2022: 766). Members of the Brick Court Chambers together with Lord Mance, Sir Bernard Rix and Ricky Diwan KC have similarly raised concerns as to this proposed reform emphasizing that the current approach is an 'essential procedural safeguard … [not] resulting in significant additional costs and or delays', while the proposal does not align with the laws of 'leading jurisdictions' including France (2022: 5).

For this contentious issue, it therefore remains to be seen what the Law Commission will decide in its final recommendations based on the

[11] For some comprehensive reviews of disagreements with the Law Commission's Consultation Paper, see: Grierson 2022 and Members of Brick Court Chambers 2022.

responses to its consultation: either moving forward with this proposal or keeping the *status quo* with section 67 as well.

Recent jurisprudence from the UK Supreme Court in 2020 has also highlighted further areas for review of the Arbitration Act 1996. While the independence, impartiality and related duty of disclosure of arbitrators were considered in *Halliburton v Chubb*, the law applicable to the arbitration agreement was addressed in *Enka v Chubb*. Both cases are significant, and yet the ruling of one (*Halliburton*) has been deemed worthy of codification by the Law Commission but not the other (*Enka*). The Law Commission instead considers that concerns raised about the law applicable to the arbitration agreements in English-seated arbitrations were not worthy of further discussions, though this matter could be reopened should arbitration stakeholders disagree—and so far, some publicly did as shown below.

Considering the proposals of the Law Commission about the duties of impartiality, independence and disclosure first, unlike other jurisdictions and the Model Law, the Arbitration Act 1996 does not provide for a duty of independence and continued disclosure but only for a duty of impartiality for arbitrators. Impartiality requires arbitrators to be neutral, while independence requires them to have no connections with the parties (Law Commission 2022a). This position was not an omission by the drafters of the Arbitration Act in the 1990s, but (as with confidentiality) the result of careful considerations. Back then, the DAC indeed considered that the 'lack of independence, unless it gives rise to justifiable doubts about the impartiality of the arbitrator, is of no significance' (DAC 1996: 292), while also emphasizing that requiring total independence—the absolute absence of connections—would be difficult (if not impossible) to achieve given the tight-knit community that is arbitration and repeat players (often in different roles, what is known as double-hatting) in different cases. As such, impartiality is what matters, although it is linked to independence. Disclosure (of previous connections, relationships) is one way to ensure that an arbitrator is impartial (*Halliburton v Chubb*). Since, after all, justice must not only be done, but also be seen to be done (*R v Sussex Justices; ex parte McCarthy* 1924).

Although disclosure is an important element to ensure the impartiality of arbitrators,[12] there is no such duty in the Arbitration Act. Good arbitral practice has instead relied on the well-known International Bar Association Guidelines on Conflicts of Interests in International

[12] The UK Supreme Court in paragraph 70 of the *Halliburton* case on the role of disclosure stated: 'One way in which an arbitrator can avoid the appearance of bias is by disclosing matters which could arguably be said to give rise to a real possibility of bias.'

Arbitration. Only in 2020, the UK Supreme Court found in paragraph 81 of the *Halliburton* case that:

> There is a legal duty of disclosure in English law which is encompassed within the statutory duties of an arbitrator under section 33 of the 1996 Act [which sets the duty of impartiality] and which underpins the integrity of English-seated arbitrations.

This duty of disclosure would, however, not be applicable to all connections an arbitrator may have—as this would be a never-ending rabbit hole given how arbitration works in practice. Instead, this obligation to disclose for an arbitrator only applies in circumstances 'which "might" give rise to justifiable doubts' as to their impartiality (*Halliburton*: para 108). The Law Commission has now endorsed this general duty of disclosure in these given circumstances by recommending its codification, while sticking to not expressly providing for a duty of independence (Law Commission 2022a). So far, available academic commentary and consultation responses seem to agree with this approach (General Council of the Bar of England and Wales 2022; Grierson 2022).

This is, however, not the case for the Law Commission's conclusion as to the law applicable to the arbitration agreement, about which it decided to do nothing, nor to investigate further. In a nutshell, it was submitted to the Law Commission that 'there should be a default rule that the law governing the arbitration agreement is the law of the seat' (Law Commission 2022a: 112).[13] Such a provision would bring some clarity and in turn avoid unnecessary delays to find which law is applicable to the arbitration agreement, which could be quite an ordeal following the lack of clarity of case law on this matter (Grierson 2022; Members of Brick Court Chambers 2022). Indeed, the decision of the UK Supreme Court in *Enka v Chubb* in 2020, while bringing '*some* clarity' (Grierson 2022: 770, original emphasis), is not perfect either and may even lead to some detrimental effects by still entailing delays and potentially giving 'a new weapon to recalcitrant parties who can thereby slow down or scupper altogether London-seated arbitrations' (Members of Brick Court Chambers 2022: 23).[14] This is because this recent decision by the UK Supreme Court still requires some investigation from lawyers and arbitrators as to the applicable law to the arbitration agreement—while Grierson adds that this judgment is quite long and not 'sufficiently clear' (Grierson 2022: 773). Therefore, the Law Commission could have taken the opportunity

[13] This is the position already adopted by the LCIA Arbitration Rules 2020 in its article 16.4 which provides for the law of the seat as the applicable law (by default) to the arbitration agreement, unless otherwise agreed by the parties.

[14] For a simplified review of this judgment, see Grierson 2022.

through its review of the Arbitration Act to either codify the *Enka* decision, clarify it, or depart from it altogether by providing for the law of the seat as the default applicable law to the arbitration agreement. Although this issue is not deemed worthy of further investigation and amendments, this may change following the consultation of arbitration stakeholders.

Contemporary challenges: forgotten already?

One pressing challenge not considered by the review undertaken by the Law Commission—but only mentioned in passing when addressing modern technology—is climate change. This is disappointing for at least two reasons: the urgency to mitigate and adapt to climate change and the increased recognition that ADR could in fact play a role in that endeavour (ICC 2019). But still, the review fails to acknowledge these realities and to consider the addition of a provision to this effect.

The numerous reports of the Intergovernmental Panel on Climate Change (IPCC) and international organizations, such as the United Nations, are increasingly alarming on the need to mitigate climate change. The last report from the IPCC simply concluded that 'it is now or never' and 'the time for action is now' (IPCC 2022). We are indeed increasingly witnessing extreme weather events, while we are also 'far off the trajectory of stabilising global temperature rise at 1.5-degrees' (United Nations Framework Convention on Climate Change 2022)—the objective set forth by the Paris Agreement 2015. Instead, 'the world is on a "catastrophic pathway" to 2.7-degrees of heating' by the end of the century (United Nations Secretary General 2021). The message is clear though, we need to drastically reduce our carbon emissions.

As seen during the Covid-19 pandemic, the level of greenhouse gases released in the atmosphere dipped for a while due to lockdowns and travel restrictions. Travels, especially by plane, are indeed one massive source of carbon emissions. And, unfortunately, cross-border disputes involving numerous actors—such as parties, lawyers, experts, witnesses, arbitrators—do entail a lot of carbon emissions (most often by air). As such, (international) arbitration was/is not eco-friendly given the need for travels but also the voluminous hardcopy bundles produced during the course of an arbitration. By way of example, the Campaign for Greener Arbitrations estimated in 2021 that, for a single cross-border arbitration, we would need to plant 20,000 trees to offset its carbon emissions (Campaign for Greener Arbitrations 2021a). It is true that because of the pandemic the carbon footprint of arbitrations—and similarly of litigation and other ADR processes—has been reduced over the past few years due

to a move to remote hearings out of necessity. However, now that the world is opening up again and Covid-19 restrictions are being lifted, we should still keep the benefits of a reduced carbon footprint in arbitrations.

The question then is how this could be achieved. Undoubtedly, the answer—as witnessed during the pandemic—lies in moving arbitration online with virtual hearings and the electronic submission and sharing of documents. There have thus been private initiatives and suggestions in order to make arbitration greener. Lucy Greenwood (2021) has identified a number of ways which require a change of behaviours from actors in arbitration (lawyers and arbitrators alike), while the Campaign for Greener Arbitrations (2021b) has developed a pledge that arbitrators are free to sign up to. Here too, the message/pledge is simple: the use of online means to conduct an arbitration should be encouraged both for hearings and written submissions, while flying should be used in last resort only.

Although not all disputes are suited to online proceedings, the experience gained during the pandemic and continuous adjustments—made not only by legal actors and institutions (through training and guidelines for example) but also by software developers (through updates of functionalities and security responding to users' feedback)—suggest that the online administration of justice could be/is the way forward (Susskind 2019).[15] This new practice would have implications for the mitigation of climate change but also increase access to justice, as consistently argued by Richard Susskind (2019). The Law Commission should therefore consider this reality in its update of the Arbitration Act 1996. This move would in fact go hand-in-hand with the England and Wales reform programme launched by the Ministry of Justice aiming at the modernization of justice through technology and innovation, for which more than £1 billion has already been allocated by the Government (Ministry of Justice 2016).

To achieve this modernization of the justice system, however, we do also need to endorse the role of technology in arbitration, and not only in litigation. Obviously, modern technology was not a concern back in the 1990s, though the Law Commission has now identified it (albeit briefly) in its Consultation Paper. Yet, no recommendations have so far been reached as to whether this issue should be legislated upon in the updated Arbitration Act. This is instead left open to the consultation asking directly to arbitration stakeholders whether the Arbitration Act 'should make express reference to remote hearings and electronic documentation

[15] With Richard Susskind (2019) even considering this could one day become the norm, and in-person processes the exception.

as procedural matters in respect of which the arbitral tribunal might give directions' (Law Commission 2022a: 105).

It is argued here that there should be such an express reference as this would bring some clarity. Indeed, several arbitral institutions have issued guidance and guidelines on online arbitral proceedings given the abrupt and unprepared turn to technology due to the pandemic. The ICC has, for example, highlighted a number of factors that should be carefully considered before an arbitral tribunal decides to conduct an arbitration online (ICC 2021). These texts are, however, only mere guidelines and thus deprived of any legislative or judicial authority. In turn, this plurality of sources could potentially lead to inconsistencies between arbitral institutions and practices. The consideration of modern technology and the formulation of some general principles for the conduct of virtual arbitrations—building on the experience during the Covid-19 pandemic—would therefore be welcome in this updated Arbitration Act.

Similarly, a clarification that a decision to conduct an arbitration online is within the powers of an arbitral tribunal, and particularly within its broad procedural discretion, would be beneficial. This would present a number of advantages not only for arbitrators, but also for the arbitral process as a whole. For arbitrators, this would remove a concern about due process (or due process paranoia) that may prevent them from going online even if that decision were to be appropriate in the case before them. This clarification would also remove concerns about whether arbitrations conducted online are in breach of article 6 of the European Convention on Human Rights 1950 (ECHR) which guarantees a right to a fair trial. This codification would thus have the advantage of avoiding tactical challenges by a frustrated party before the courts for lack of due process or breach of article 6 ECHR. This issue has indeed already made its way up to the Austrian Supreme Court which 'confirmed a tribunal's power to hold remote hearings [even] over one party's objections' (Blackaby & Ors 2022: 294). Addressing online arbitration in the updated Arbitration Act would therefore bring more certainty to the arbitral process as a whole and avoid unnecessary additional costs and delays due to challenges before the courts. Finally, England would not be the first Arbitration Act to explicitly endorse the use of modern technology in arbitral proceedings since the Netherlands has already done so in its updated Dutch Arbitration Act from 2015.

[E] CONCLUSION

As their European counterparts on the continent and Scottish neighbour have already done, England and Wales stand ready to update the Arbitration Act 1996 which has recently celebrated its 27th anniversary. It is undeniable that English arbitration law is one of the most popular laws (if not the most) and London a top destination for the conduct of arbitrations. Therefore, this review will likely consist of targeted updates, light-touch reforms, or simply keeping the *status quo* in order to not disrupt this established and uncontested popularity. Although this article has highlighted some controversial aspects of the Consultation Paper published by the Law Commission in September 2022, it should, however, be acknowledged that this review is overall positive.

This article has focused on issues worthy of further investigations in order to improve the competitiveness of English arbitration law given recent developments and contemporary challenges. Concretely, this means that the Law Commission should further consider how it could add provisions reflecting the increased use of modern technology by arbitral tribunals—through video hearings or the sharing of e-documents for example—and the urgent need to reduce the carbon footprint of arbitration to help towards the mitigation of climate change. In addition, a provision to clarify the law that is applicable to an arbitration agreement in the absence of an express choice by the parties would be welcome, even though the UK Supreme Court recently considered this matter in 2020.

Furthermore, the review of the Arbitration Act is not only an opportunity to address concerns that were non-existent (such as modern technology) or not as prevalent (such as climate change) 27 years ago. Indeed, the English arbitration law could be further refined by building on good arbitration practice. However, for some of the issues identified in this article (such as the confidentiality of an arbitration) keeping the *status quo* was deemed preferable, since these issues had already proved unsettling to the DAC in the 1990s.

In any case, given that the Law Commission is now analysing the answers provided by stakeholders in arbitration as part of its public consultation, it remains to be seen what its final recommendations will be.

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