GIBSON DUNN

UK to Update Arbitration Act and Join Hague Convention on Recognition and Enforcement of Foreign Judgments

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The steps will further strengthen London's position as a leading centre for resolution of cross-border commercial disputes. The UK Government has recently taken two steps that will further strengthen London's position as a leading centre for the resolution of cross-border commercial disputes: (1) introducing legislation updating the UK Arbitration Act 1996 (the "**1996 Act**"); and (2) confirming that the UK will join the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (the "**Hague Convention**") as soon as practicable. This client alert highlights some key takeaways from each development. **I. Updates to the 1996 Act *(a) Status*** Arbitration in England and Wales is regulated by the 1996 Act – a framework that has helped contribute to London's global ranking as the most preferred seat for international commercial arbitration.[1] In 2021, the UK Government asked the Law Commission to review the 1996 Act, to determine "*whether there might be any amendments to be made in order to ensure that it is fit for purpose…*".[2] The results of this consultation process were published in September 2023, together with proposed draft legislation to implement the reforms proposed (the "**Arbitration Bill**"). The consultation concluded that wholesale reform was not needed or wanted; and the list of recommendations were confined to "*a few major initiatives*", and "*a very small number of minor corrections*".[3] On 21 November 2023, the Arbitration Bill began its progress through the UK Parliament.[4] It is expected that the legislative process will be straightforward, and that the amended act will become law in 2024. ***(b) What are the key changes?*** Although the Arbitration Bill does not seek to reform the 1996 Act wholesale, there are some important changes:

1. **A new express provision for summary disposal**. The Arbitration Bill provides that a party will be able to apply for a claim, defence or issue to be dismissed "*on a summary basis*" if it has "*no real prospect of succeeding*" (thus aligning the test with that of summary judgment in the English courts). Whilst the power to dismiss summarily exists implicitly under the 1996 Act, the lack of express provision has meant that arbitral tribunals have been reluctant to exercise this power in practice. The proposed standard for dismissal is lower than most arbitral institutional rules provide ("*manifestly without merit*").[5] Parties may nevertheless agree to those higher standards, however, as the new provision of the 1996 Act will be 'opt out'.

2. **The law governing an arbitration agreement is the law of the seat of the arbitration, absent express party agreement otherwise**. This reverses the UK Supreme Court's decision in *Enka v Chubb* [2020] UKSC 38,[6] where the court held, in short, that where parties have not expressly chosen a law to govern an agreement to arbitrate, but they have made an express choice of law to govern the wider (or "matrix") contract in which the arbitration agreement sits, the law governing the matrix contract is likely to be considered the implied choice of law of the arbitration agreement. This is an important change for parties negotiating arbitration agreements: the law that governs that arbitration agreement should be express if different to the law of the seat, otherwise it will be deemed to be the law of the seat.

Related People

Piers Plumptre

Stephanie Collins

Theo Tyrrell

3. **The process for challenging an award for lack of substantive jurisdiction has changed**. Under s. 67 of the 1996 Act, a party may challenge an award as to its substantive jurisdiction, and this will involve a full re-hearing before court. The Arbitration Bill expressly limits the new arguments that may be heard in that context as follows:
    - a ground for objection that was not raised before the arbitral tribunal must not be raised before the court unless the applicant shows that, at the time of the arbitration proceedings, the applicant did not know and could not with reasonable diligence have discovered the ground;
    - evidence that was not heard by the tribunal must not be heard by the court unless the applicant shows that, at the time of the arbitration proceedings, the applicant could not with reasonable diligence have put the evidence before the tribunal; and
    - evidence that was heard by the tribunal must not be re-heard by the court, unless the court considers it necessary "*in the interests of justice*".

4. **The court's supportive powers of arbitration proceedings have been clarified**. The Arbitration Bill: (i) clarifies that orders under s. 44 of the 1996 Act (including in relation to the preservation of evidence, and for injunctive relief) can be made against third parties;[7] and (ii) provides for the enforcement of emergency arbitrator decisions.[8]

5. **Codifies an arbitrator's duty of disclosure**, introducing a statutory duty on an arbitrator to disclose "*circumstances that might reasonably give rise to justifiable doubts as to* [their] *impartiality*".[9]

II. UK to join the Hague Convention The second notable development is the UK Government's confirmation that the UK will join the Hague Convention "*as soon as practicable*", following a consultation period.[10] The Hague Convention is a multilateral convention, which entered into force on 1 September 2023. The Hague Convention provides a set of common rules for the recognition and enforcement of judgments given in civil and commercial matters, between Contracting Parties. The merits of a judgment cannot be reviewed, and recognition and enforcement can only be refused on the grounds specified therein. While most national laws provide for the enforcement of foreign judgments (subject to certain conditions), such laws differ as between jurisdictions. This can make the enforcement of foreign judgments unpredictable, lengthy and costly. By establishing common rules, however, the Hague Convention provides greater certainty and reduces complexity (and cost) of that process. The UK Government is expected to sign and ratify the Hague Convention without delay, and it will enter into force 12 months from the date on which the UK deposits its instrument of ratification. _____ [1] Queen Mary University of London, 2021 International Arbitration Survey: Adapting arbitration to a changing world, *available here*: https://arbitration.qmul.ac.uk/research/2021-international-arbitration-survey/. [2] Law Commission, Review of the Arbitration Act 1996, Current project status, *available here*: https://lawcom.gov.uk/project/review-of-the-arbitration-act-1996/. [3] Law Commission, Review of the Arbitration Act 1996: Final report and Bill, paragraph 1.22, *available here*: https://lawcom.gov.uk/project/review-of-the-arbitration-act-1996/. [4] https://bills.parliament.uk/publications/53038/documents/4022. [5] See, for example, LCIA Arbitration Rules 2020, Article 22.1(viii); ICSID Convention Arbitration Rules 2022, Article 41; ICC Rules of Arbitration, Article 22 and Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration, Section C. [6] *Enka v Chubb* [2020] UKSC 38, *available here*: https://www.supremecourt.uk/cases/docs/uksc-2020-0091-judgment.pdf. [7] Section 9 of the Arbitration Bill. [8] Section 8 of the Arbitration Bill. [9] Section 2(2) of the Arbitration Bill. [10] Government response to the Hague Convention of July 2019 on the Recognition and Enforcement of Foreign Judgements in Civil or Commercial Matters (Hague 2019), 23 November 2023, *available here*:

https://www.gov.uk/government/consultations/hague-convention-of-2-july-2019-on-the-recognition-and-enforcement-of-foreign-judgments-in-civil-or-commercial-matters-hague-2019/outcome/government-response-to-the-hague-convention-of-july-2019-on-the-recognition-and-enforcement-of-foreign-judgements-in-civil-or-commercial-matters-hagu.

The following Gibson Dunn attorneys assisted in preparing this update: Piers Plumptre, Stephanie Collins, Theo Tyrrell and Harriet Codd.

Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding these issues. Please contact the Gibson Dunn lawyer with whom you usually work, any member of the firm's International Arbitration, Judgment and Arbitral Award Enforcement, or Transnational Litigation practice groups, or any of the following in London: Penny Madden KC (+44 20 7071 4226, pmadden@gibsondunn.com) Piers Plumptre (+44 20 7071 4271, pplumptre@gibsondunn.com) Stephanie Collins (+44 20 7071 4216, SCollins@gibsondunn.com) Theo Tyrrell (+44 20 7071 4016, ttyrrell@gibsondunn.com) Harriet Codd (+44 20 7071 4057, hcodd@gibsondunn.com)

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