Don’t Predict the Future, Create It – Arbitration Trends and Projections for 2025

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PRACTICES International Arbitration

The Arbitration Act 2025 for England, Wales and Northern Ireland, which received Royal Assent on 24 February 2025, amends the Arbitration Act 1996 to clarify certain legal issues, including governing law for arbitration agreements, arbitrator disclosure duties, summary dismissal of claims and recognition of emergency arbitrators. It does not address confidentiality or AI, even though both continue to evolve through case law and institutional guidelines. Haynes Boone attorneys Andreas Dracoulis, Fiona Cain and Zainab Al-Qaimi authored an article in Mealey’s International Arbitration Report breaking down the changes to the Arbitration Act 1996 and how this might impact the arbitration landscape in 2025.

Read the full article below.

Predictions for the future are by their nature uncertain. It is possible to draw on what has happened in previous years, such as the cases heard by the courts, to identify future trends. New rules introduced by arbitral institutions also provide a barometer on developments. However, for England and Wales, as 2025 is very likely to see the introduction of an amendment to the Arbitration Act 1996 (the Act), it is possible to say with some certainty how issues which have previously been the subject of common law, will now fall to be determined in the future. In essence, in 2025 arbitration in England and Wales is adopting the approach advocated by Abraham Lincoln; “The most reliable way to predict the future is to create it.”

The Arbitration Bill (the Bill) is the result of a comprehensive review of the Act by the Law Commission in 2022 and 2023, which involved two public consultations. The Bill was first introduced into the UK Parliament in 2023, but did not complete the legislative process before the general election was called in May 2024 and the UK Parliament prorogued. However, the new government reintroduced the Bill shortly after it came to power and the Bill has made swift progress completing its journey through the Houses of Parliament on 11 February 2025 and is now pending Royal Assent. The Bill, once enacted, will introduce changes to the Act, which has been in place for 28 years, and provide clarity on certain matters which have come before the courts regularly including in 2024, some of which are discussed below.

The Bill – What Will It Change?

The Law That Governs the Arbitration Agreement

In 2024, the Supreme Court was asked to determine whether the English court, rather than the French court, had jurisdiction over a bank’s claim for an anti-suit injunction against a Russian company which had commenced proceedings in the Russian courts in breach of the arbitration agreement. In UniCredit Bank *GmbH v RusChemAlliance* LLC [2024] UKSC 30, the bonds issued by the bank were governed by English law, and although the parties had specified that the arbitration would be seated in Paris and under the ICC Rules, there was no express provision setting out the law applicable to the arbitration agreement.

The Act does not currently address the law applicable to an arbitration agreement or provide guidance on how this can be determined where it is not expressly stated by the parties. It has therefore fallen to the courts to determine how to identify the proper law of the arbitration agreement.

Following nearly a decade where difficulties were experienced in determining the proper law governing the arbitration agreement, guidance was finally provided by the Supreme Court in *Enka Insaat Ve Sanayi A.S. v OOO Insurance Company Chubb* [2020] UKSC 38. Here, the Supreme Court established a two-pronged test to determine the governing law of the arbitration agreement where this has not been specified by the parties:

- where the main contract between the parties, which contains the arbitration agreement, includes an express choice of governing law, this would extend to the arbitration agreement; and
- where the main contract is silent on the governing law (or does not contain the arbitration agreement), the arbitration agreement would be governed by the law with the 'closest connection' to the arbitration agreement (which will usually be the law of the chosen seat of arbitration).

A further issue arose the following year in the case of *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* [2021] UKSC 48, when the Supreme Court held that English law applied to an arbitration agreement. This was on the basis that while it was agreed that disputes were to be referred to ICC arbitration in Paris, there was no express provision addressing the governing law of the arbitration agreement, but the main agreement was governed by English law. However, a conflict arose when the French Court of Cassation found that the law of the seat (French law) should govern the arbitration agreement in this case. The discrepancy between these approaches highlights the importance of specifying the governing law of the arbitration agreement, and underscores the risks associated with failing to do so.

The Law Commission had not intended to address the issue, but as it was raised during the consultation, they took the opportunity to consider the issue, noting that the test in *Enka was "complex and unpredictable*". Also, with the issue coming back before the Supreme Court last year, the need to clarify this area of law could not be ignored. In *Unicredit*, the Supreme Court held that, in absence of the express choice, the law of the main contract would govern the arbitration agreement despite the arbitration being seated elsewhere, reaffirming the approach set out in *Enka*.

The Bill is set to change the principles laid down in *Enka* and applied in *Unicredit* and the current common law position. Clause 1 of the Bill would create a new section 6A in the Act and provide that the law of the seat will govern the arbitration agreement unless the parties have expressly agreed otherwise. This change seeks to simplify the process and address the uncertainty rooted in the existing common law approach. It is also likely to see a reduction in the number of cases involving anti-suit injunctions which have to be appealed due to questions about the application of the test in *Enka* and provide certainty that where an arbitration is seated in London, and the arbitration agreement does not expressly provide otherwise, the law governing the arbitration agreement will be English law.

Duty of Disclosure

The Act requires that the tribunal shall act fairly and impartially as between the parties and where a tribunal does not do so, it provides the parties with the ability to challenge an arbitrator's impartiality

under section 24 of the Act. This has led to a number of challenges being brought before the courts in recent years, most significantly the decision of *Halliburton Co v Chubb Bermuda Insurance Ltd* [2020] UKSC 48. In 2024, there were two cases where arbitrators were removed or awards challenged for serious irregularity due to a lack of disclosure.

In *H1 and another v W and others* [2024] EWHC 382, the Commercial Court exercised the power conferred under section 24 of the Act to remove a sole arbitrator. Concerns over the impartiality of the arbitrator arose when, during a procedural hearing, the arbitrator made several statements indicating pre-judgment of the case. The arbitrator expressed familiarity with one of the party's expert witnesses, both personally and by reputation, and decided against hearing from any of the experts. These remarks led to justifiable doubts about the arbitrator's impartiality. In an application of the test for apparent bias laid down in Halliburton, the court determined that the remarks would lead a fair-minded, objective observer to conclude there was a real possibility of bias and that it was appropriate to remove the arbitrator.

The issue of apparent bias also arose in the case of A*iteo Eastern E & P Company Limited v Shell Western Supply and Trading Limited and others* [2024] EWHC 1993 (Comm). Here, only some of the professional connections between one of the arbitrators in an ICC arbitration, and Freshfields, who acted on behalf of Shell, had been disclosed in a timely manner. When these further professional connections came to light, the claimant challenged the arbitrator for apparent bias, which was accepted by the ICC Court, and the arbitrator was replaced. The claimant then applied to the English courts to set aside the partial awards that had previously been rendered by the tribunal. Applying the test in *Halliburton*, it was held that the informed observer would consider that there was a real possibility of unconscious bias, particularly when the ICC Court had already removed the arbitrator. It found that in this case substantial injustice could be inferred, unless there were circumstances which rebutted it. For three of the awards there were circumstances to rebut the inference, but the section 68 challenge in respect of one of the arbitration awards was successful, and that award was remitted to the newly constituted tribunal for reconsideration.

2024 has also seen the International Bar Association (IBA) issue an update to its Guidelines on Conflicts of Interest in International Arbitration. These non-mandatory guidelines are often referred to by tribunals and appointing authorities particularly when there are challenges to an arbitrator on the basis of lack of independence or impartiality. The revisions only seek to "fine tune" the guidelines which continue to set out the situations where an arbitrator should give disclosure on the basis of a traffic light system which identifies the likelihood of a conflict of interest.

Going forward, the Bill aims to introduce for arbitrators involved in arbitrations conducted under the laws of England Wales a duty of disclosure in respect of impartiality. It is proposing that a new section 23A will create a statutory duty of disclosure requiring an arbitrator to disclose any relevant circumstances "*that might give rise to justifiable doubts as to the individual's impartiality in relation to the proceedings*" prior to appointment, and thereafter when the arbitrator becomes aware of any relevant circumstances. For many arbitrators this is unlikely to create significant change as they already provide disclosure, but it makes it clear that all arbitrators are under a duty to do so.

Summary Dismissal and Emergency Arbitrators

The Act does not expressly provide the power for summary disposal. However, summary disposal is permitted under section 33 of the Act which allows a tribunal to adopt procedures suitable to the circumstances of a case as part of its duty to act fairly and avoid unnecessary delay or expense. However, in recent years, arbitral institutions such as the LCIA (in the LCIA Rules 2020) now expressly include an early determination process. Where such rules do not apply, arbitral tribunals

have been cautious in exercising this power. The Bill addresses this with the aim to provide an express provision dealing with summary dismissal in the Act.

A new section of the Act, section 39A, will allow an arbitral tribunal, on an application from a party, to make an award on a summary basis, either in relation to the claim as a whole or a particular issue arising in a claim, if the tribunal considers that a party has no real prospect of succeeding on the claim or issue. In contemplating the threshold under this proposed power, the Law Commission considered whether this should reflect the test in most arbitral rules (where a claim or defence is manifestly without merit), or the test in the English courts for summary judgment and decided that it should mirror the threshold for summary judgment used by the courts – where a claim or defence lacks a real prospect of success. The Law Commission highlighted that this would bring arbitration closer in line with English court proceedings, where summary judgment is frequently used to dismiss meritless claims. The Bill would allow parties to opt-out of this provision, and where it does apply requires the arbitral tribunal to afford the parties a reasonable opportunity to make representations to the tribunal to ensure fairness.

Similarly, the Act does not currently support the appointment of emergency arbitrators, who are appointed prior to the constitution of the tribunal. In recent years, however, the appointment of emergency arbitrators has been provided for in the rules published by institutions such as the ICC and LCIA. The Bill proposes to amend the Act by adding a new section 41A which will provide support for emergency arbitrators appointed pursuant to rules which provide for their appointment and allow the emergency arbitrator to issue peremptory orders and make relevant applications for court orders. It will also provide access to the court's enforcement mechanism.

The Bill – What It Won't Change?

Confidentiality

The Act does not address confidentiality, and this will not change as a result of the Bill, as the Law Commission concluded that there should not be a default presumption of confidentiality in all types of arbitration. Instead, English law continues to rely on an implied duty that privacy and confidentiality will be upheld in arbitration. This was settled by the decision in *Department of Economics*, *Policy and Development of the City of Moscow v Bankers Trust Co* [2004] EWCA Civ 314 and confirmed by the Supreme Court in the case of Halliburton. In addition, many of the arbitral institutions include express rules addressing confidentiality.

The duty of confidentiality under English law is not absolute, and may be outweighed by other considerations, such as public interest or judicial review. This is what happened in a case heard by the Commercial Court in 2024. The case of *Mordchai Ganz v Petronz FZE* [2024] EWHC 1011 (Comm) involved a challenge to an arbitration award under section 67 of the Act, where the Court decided to publish the judgment in full, despite objections to the disclosure of sensitive information. The claimant had failed to identify any specific confidential information and also sought to challenge the existence of the arbitration agreement. The Court concluded that the public interest in understanding the workings of arbitration and maintaining transparency in judicial processes meant that there was no good reason not to publish its judgment.

Artificial intelligence (AI)

Finally, one further development which will continue to impact arbitration in 2025 that is not mentioned in the Bill is AI. In recent years, AI tools have improved arbitration related tasks including document review, translation and legal research. 2024 saw the introduction of the arbitration-

specific AI guidelines, firstly by the Silicon Valley Arbitration and Mediation Centre and more recently by the SCC Arbitration Institute which has published a guide on the use of AI in cases administered under the SCC Arbitration Rules; while the American Arbitration Association now offers AI-powered writing and document analysis tools to its arbitrators and mediators, as well as parties on a case by case basis. Developments and guidance on the use of AI such as these are likely to continue throughout 2025.

This commentary was submitted before the UK Arbitration Bill received Royal Assent, making it an official Act of Parliament on 24 February 2025.