ENGLISH ARBITRATION ACT 2025: PANACEA TO SOME PRACTICAL PROBLEMS AND THE ISSUE OF IMMUNITY OF ARBITRATORS*

Abstract
Prior to 2025, the provisions of Arbitration Act 1996 formed the framework for arbitrations held within England, Wales and Northern Ireland.[1] Arbitration Act 2025 amended the provisions of the Arbitration Act 1996 rather than repealing it. The new Act addressed some practical problems in arbitration by making provisions that streamlined procedures, clarified certain legal issues, strengthened the immunity of arbitrators through enhanced efficiency and cost reduction. The 2025 Arbitration Act specifically introduced power of summary disposal, made clear provision on the governing law of arbitration agreement and expands the immunity of arbitrators etc. Due to words limitation, this study will discuss and focus majorly on the practical problems in arbitration which the new Act tried to solve as well as the extent of the arbitrators' immunity under the new Act.

Keyword: Arbitration Act 2025, Immunity of Arbitrators, Some Practical Problems, English Law

1. Introduction

Before the enactment of the Arbitration Act 2025, the 1996 Arbitration Act was silent on the determination of the governing law of an arbitration agreement and parties were left with looking to common law for clarity and answers. The common law is considered as follows: whether the parties have made express choice of law; whether there is an implied choice of law from the agreement in the absence of an express choice; and which system of law is the arbitration agreement close and connected to?

2. Discussion

The cases of *Enka v Chubb*[2] and *Sulamerica Cia Nacional De Seguros SA v Enesa Engenharia SA & Ors*[3] set out the test for determining the law applicable to an arbitration agreement. The Court of Appeal in *Sulamerica Cia Nacional De Seguros SA v Enesa Engenharia SA & Ors*[4] held:

> Unless there has been an express choice of the law that is to govern the arbitration agreement, the general rule should be that the arbitration agreement is governed by the law of the seat, as a matter of implied choice, subject only to any particular features of the case demonstrating powerful reasons to the contrary.

The Court of Appeal established a presumption that the law of the seat governs the arbitration agreement in the absence of an express choice by the parties.

The Supreme Court significantly reformulated this rule in *Enka v Chubb*[5]. It was held that: 'Where the law applicable to the arbitration agreement is not specified, a choice of governing law for the contract will generally apply to an arbitration agreement which forms part of the contract. The choice of a different country as the seat of the arbitration is not, without more, sufficient to negate an inference that a choice of law to govern the contract was intended to apply to the arbitration agreement.'

This decision of the Supreme has received enormous critics for placing importance on the law of the underlying contract to determine the law of the arbitration agreement. This takes away possibility of the law of the seat from applying as the governing law where there is no express or implied choice of law.

Arbitration Act 2025 wiped out the legal uncertainty over the governing law of the arbitration agreement and provided the much-needed clarity in its provision as follows:

> (1) The law applicable to an arbitration agreement is –
> a)The law that the parties expressly agree applies to the arbitration agreement, or
> b) Where no such agreement is made, the law of the seat of the agreement in question.
> (2) For the purposes of Subsection (1), agreement between the parties that a particular law applies to an agreement of which the arbitration agreement forms a part does not constitute express agreement that the law also applies to the arbitration agreement[6]

The above clear and express provision of the new Act provided solution to the practical problem of determining the governing law of an arbitration agreement. Thus, the governing law of an arbitration agreement is clarified to be the law of the seat of the arbitration in the absence of an express choice or agreement of the parties. Consequently, where parties

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[1] Charlie Caher, Matleo Angelini, Louisa Salmon, Arthur Azis. https://www.wilmerhale.com/en/insights/client-alerts/20250304-evolution-not-revolution-key-practical-implications-of-the-new-arbitration-Act-2025. Accessed 4 June, 2025
[2] (2020) UKSC 38
[3] (2012) EWCA CIV 638
[4] Ibid para 91
[5] Ibid paras iv & v pg 58
[6] Section 6A Arbitration Act 2025

to a contract choose London as the seat of the arbitration agreement without specifying on the governing law, now know with certainty that the Arbitration Act 2025 applies.

Another significant change identified in the new Act is the clear procedure in challenging an arbitral award on jurisdictional basis. Under the 1996 Act, a party who challenged the jurisdiction of the tribunal during the arbitration can challenge the award on jurisdictional grounds.[7] The new Act[8] provides for a new procedure in challenging arbitral award over substantive jurisdiction. It provided that:

- The court will not entertain new grounds of objection not raised before the tribunal.
- Evidence not put before the tribunal cannot be brought before the court.
- Evidence already heard by the tribunal will not be re-heard by the court.

The above two points or provisions are subject to exception which is the 'reasonable diligence test'.[9] Thus, where the applicant shows that it could not with reasonable diligence have put the evidence before the tribunal or discovered the ground during the arbitral proceedings, the application challenging the award on jurisdictional basis will succeed. The new Act further, in a bid to lighten the shadow of uncertainty and expedite proceedings, granted power to the arbitrator to enter awards summarily on issues/cases with no real prospect of success. An arbitrator is expressly empowered by the Act[10] to render an award on a summary basis upon application made by a party to the proceedings, if the other party has no real prospect of succeeding. Also, such an application must be made on notice to the other party and reasonable time must be afforded to the parties to make their representation before the tribunal. This development in the new Act, addressed decisively the problems parties to arbitration in encounter during the arbitration process. This in no doubt will improve efficiency and prevent frivolous claims/defence that prolongs proceedings.

Furthermore, the empowerment of the emergency arbitrators by the 2025 Act[11] to make preemptory orders and enforce same has increased the confidence of parties over an Emergency Arbitration and its process. Now emergency arbitrators can make or issue preemptory orders and grant relevant permission to parties to apply to court for its enforcement under Section 44. Worthy of note is the height in the immunity of arbitrators under the new Act. The 2025 Act strengthened an arbitrator's immunity in no small measure. Although the 1996 Act[12] provided for the immunity of arbitrators. Arbitrators who discharged their duties and made decisions in good faith are not liable for anything done or omitted to be done. However, this immunity could be lost in an event of the resignation of the arbitrator or in an application of a party to court for their removal. The AA 2025 significantly improved and strengthened the arbitrators' immunity to cover the arbitrators' resignation and/or application for removal by a party. Thus, an arbitrator is protected from liability upon resignation unless it is shown that the resignation was 'unreasonable'[13]; also, the arbitrator is not liable for the costs incurred in a removal process by a party unless his act or omission is shown to be in bad faith[14]. This improvement of the arbitrators' immunity in the new Act has in no small way enhanced their immunity and protection, allowing the arbitrators to focus and make impartial and robust decisions without fear of being slammed with liability.

3. Conclusion

The 2025 Arbitration Act which is merely an amendment to the 1996 has tried in no little measure to overcome some of the practical problems in arbitration both by the parties as well as the arbitrators through the new provisions identified above in this work. By these new provisions, the new Act has done away with the legal uncertainty in arbitration process over the governing law of an arbitration agreement. It further promotes efficiency, speedy process, cost-effectiveness and brings UK's arbitration legislation to align with the current state of the art and international best practices through its streamlined procedures for challenging jurisdiction, empowering the arbitrators to make summary disposal of issues/matters where there is no real prospect of success (except the parties think otherwise), further empowering emergency arbitrators to make and enforce their preemptory orders and ensuring the independence and protection of the arbitrators. However, since the new Act has not come into force yet, these provisions have not been tested and thus we are yet to experience its efficiency in overcoming these practical problems.

[7] Section 67 Arbitration Act 1996
[8] Section 10(3) Arbitration Act 2025 inserted after Section 67(3)(A) of Arbitration Act 1996
[9] Arbitration Act 2025/PART I: Five most Impactful Changes for Businesses https://www.mayerbrown.com/en/people/o/pgrady-rachael accessed 10th June 2025
[10] Section 39A (1)(2)(3) Arbitration Act 2025
[11] Section 41A (1)(2)
[12] Section 29
[13] Subsection 4 Arbitration Act 2025
[14] Section 24 (5A) Arbitration Act 2025