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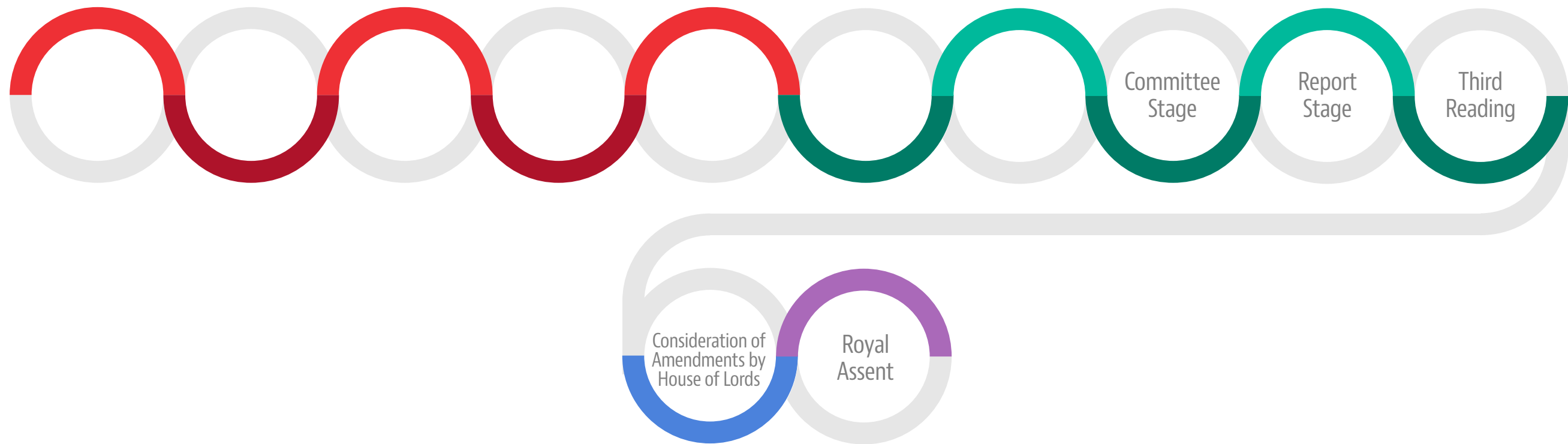
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The Arbitration Bill

The UK Government asked the Law Commission (LC) to review the Arbitration Act 1996 (AA) – the principal legislation governing arbitrations in England and Wales and in Northern Ireland – to determine whether any amendments are required in order to ensure that the AA remains fit for purpose and continues to promote the UK as a leading destination for commercial arbitration. The LC published its first consultation paper in September 2022 and its second in March 2023. Having received a large number of detailed responses from a wide range of consultees, the Arbitration Bill (the Bill) was introduced into Parliament on 21 November 2023.

Many of the proposed new provisions simply codify the position with respect to accepted conventions in arbitral practice and/or simplify some of the more complicated precedent that has developed since the AA was enacted in 1996.

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This amendment represents a departure from the current position (developed by precedent), whereby the law of the contract (not the law of the seat) was implied as the governing law of the arbitration agreement where it had not otherwise been agreed by the parties and drafted into the agreement. Under the updated Act, the law of the seat will be implied as the law governing the arbitration agreement, unless the agreement to arbitrate is derived from an international treaty or foreign legislation.

Careful consideration should be given to the governing law when drafting an arbitration agreement. If the parties intend for any potential dispute to be governed by the law of a jurisdiction which is distinct from the seat of the arbitration, this must be expressly provided for.

Clause 2 of the Bill simply codifies the general duty of disclosure already incumbent on arbitrators, as established by the relevant case law on the issue. Note that under the updated AA, arbitrators will be required to disclose any circumstances that might reasonably give rise to justifiable doubts as to their impartiality.

The duty arises from the point at which the arbitrator is approached about their potential appointment (i.e. before they are actually appointed), and continues to apply after their appointment. It captures any circumstances of which the arbitrator is actually aware, and of which they ought reasonably to be aware.

The purpose of the amendments introduced by Clauses 3 and 4 of the Bill is to extend the scope of immunity afforded to arbitrators in two specific circumstances:

1. **Removal:** Where an arbitrator is removed following a successful application by a party to the arbitration (under Section 24 of the AA). Under the updated Act, an arbitrator will not be liable for the costs of the application for their removal, unless the arbitrator is found to have acted in bad faith. This amendment reverses the position established under case law, whereby the court was empowered (should it so decide) to order the arbitrator to pay those costs.
2. **Resignation:** Where an arbitrator resigns of their own accord. Under the updated Act, an arbitrator will not incur liability, unless it is found that the resignation was unreasonable, in all the circumstances.



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an award summarily where an issue, claim or defence has no real prospect of success. The “no real prospect of success” test is the threshold applied in litigation proceedings.

Note that new Section 39A of the AA is not mandatory, meaning that the parties can agree to opt out of the provision. From a practical perspective, careful thought should be given to whether there is a strategic benefit, or disadvantage, in exercising the available opt out option.



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not be entitled to a full rehearing before the court where a tribunal has already ruled on the applicant's challenge; nor will the applicant be permitted to rely on any evidence or legal argument in support of its challenge that was not heard by the tribunal at the original hearing, unless (i) it was not reasonably possible to put this material before the tribunal, or (ii) it is necessary in the interests of justice.

On a practical note, this amendment reverses the position developed under case law, which permitted a full re-hearing used to be permitted.



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