

**Formal Response to the Law Commission’s**

**Consultation Paper on the Review of the Arbitration Act 1996**

*by Members of Brick Court Chambers*

*together with Lord Mance, Sir Bernard Rix and Ricky Diwan KC*

**(A) Introduction and proposed reform**

1. This is a formal response to the Law Commission’s Consultation Paper on the Review of the Arbitration Act 1996 (“the Consultation Paper”) submitted on behalf of Lord Hoffmann, Lord Phillips, Sir Richard Aikens, Sir Christopher Clarke, Hilary Heilbron KC, Vernon Flynn KC, Salim Moollan KC, Kyle Lawson, Zahra Al-Rikabi, Emilie Gonin, Jessie Ingle, Allan Cerim and Andris Rudzitis of Brick Court Chambers, together with Lord Mance, Sir Bernard Rix and Ricky Diwan KC and with the further members of Brick Court Chambers listed in Annex 1.
  
2. It does not engage with each and every question raised by the Consultation Paper. It focuses instead on three related issues of jurisdiction and applicable law which are, it is submitted, of paramount importance in the contemplated reform. These issues were addressed at Brick Court Chambers’ Annual Commercial Conference held in London on 13 October 2022 (“the BCC Conference”, held with the participation of the Law Commission), and are as follows:
  - (a) Challenges to the jurisdiction under Section 67 of the Arbitration Act (“the Act”);
  
  - (b) The rationalisation of the multiple avenues of challenge to the jurisdiction which currently coexist under sections 9, 32, 67 and 72(1) of the Act;
  
  - (c) Addressing the unfortunate and serious consequences arising from the decision in *Enka v Chubb* [2020] UKSC 38 in which it was held that in every London seated arbitration with a choice of foreign substantive law, the arbitration agreement will

be governed by that foreign law (“the first rule in *Enka*”) and that the effect of section 4(5) of the Act is that that choice of foreign law will automatically displace the non-mandatory provisions of the Act where the provision is ‘substantive’ and not ‘procedural’ (“the second rule in *Enka*”).

3. The Law Commission’s Terms of reference for the review of the Act (which are set out in Appendix 1 of the Consultation Paper) record that “[t]he Commission and the Department recognise the value of arbitration to the UK economy, and resolve that the review should be conducted in a manner which aims to enhance the competitiveness of the UK as a global centre for dispute resolution and the attractiveness of English and Welsh law as the law of choice for international commerce.” It is our submission that the reforms proposed in this present response on those three points (particularly on points 1 and 3, with point 2 relatedly providing a better answer to the issues raised by the Law Commission in relation to point 1) are crucial in ensuring the competitiveness of London (and thus the UK) as a global centre for international arbitration (and thus dispute resolution) and the attractiveness of English and Welsh law.
  
4. In that respect, we note that there is now global competition between jurisdictions which market themselves, and which are perceived, as ‘safe seats’ for international arbitration such as London, Paris, Geneva and Singapore. A very important part of that global competition consists in ensuring that the jurisdiction in question has a state-of-the-art legislative framework which will support arbitration and ensure its effectiveness, particularly in the face of attacks from parties who would renege on their agreement to arbitrate once a dispute has arisen – usually because they do not expect the substantive outcome of that dispute to be positive (hereinafter referred to as “recalcitrant parties”). Singapore, for instance, has been astute at making regular and well-publicised changes to its arbitration legislation to that end. The demands on legislative time in England and Wales mean that our jurisdiction cannot afford to make legislative changes at that pace and in that fashion, and the present law reform exercise is accordingly a very important, and probably unique opportunity to resolve the problems which exist under the Act and to ensure that the legislative framework in England and Wales is on a par with, if not better than, London’s competitors.

5. We respectfully submit that the positions put forward in the present response on each of the three above points fall fairly and squarely in that category. Specifically:
- (a) The rule laid down by the Supreme Court in *Dallah v Pakistan* [2010] UKSC 46 (providing for *de novo* review on challenges to jurisdiction) has gained universal recognition worldwide (including in competing jurisdictions) as a cardinal rule of international arbitration which gives effect to the key principle that, while it is important to protect the arbitral process from illegitimate attacks from recalcitrant parties, it is equally important to protect parties who have in truth *not* agreed to arbitrate from illegitimate arbitral proceedings; and that the courts of the seat must be the ultimate and unhindered arbiter in that respect.<sup>1</sup> As explained in this response, the premise for the proposed change to that rule in England and Wales is, in our submission, incorrect. Further, to change that rule would send the wrong message to the international community.
  - (b) We<sup>2</sup> do however agree that the current framework for challenges to jurisdiction is cluttered, and that there is a need to rationalise it. The solution does not, with respect, lie in changing the rule in *Dallah*, but in (i) amending sections 9(1) and 9(4) to bring them in line with international practice and get rid of the inefficiencies in time and costs which arise from the way in which they are currently applied;<sup>3</sup> and (ii) abrogating sections 32 and 72(1) which are duplicative and unnecessary (and have no equivalent in other leading jurisdictions).
  - (c) As explained in this response, the changes to English law brought about by the decision in *Enka* have the effect of displacing the framework carefully put in place by our courts to protect the arbitral process under English law in favour of a foreign law of unknown content which may or may not protect the arbitration. This is so for all central aspects of the arbitration including (i) arbitrability; (ii) questions as to the scope of the clause (including the presumption of “one stop adjudication”

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<sup>1</sup> That must in turn be balanced with the (also universally recognised) principle of *compétence-compétence*, which allows tribunals to determine their own jurisdiction in the first instance (subject to that court review).

<sup>2</sup> This does not include Lord Mance, who prefers not to endorse that aspect of this response (as developed in Part C, paragraphs 28 to 45), particularly the proposed reformulation of section 9(4) of the 1996 Act.

<sup>3</sup> See in particular *Al Naimi v Islamic Press Agency* [2000] EWCA Civ. 17; *Albon v Naza Motors* [2007] EWCA 1124, *Aeroflot-Russian Airlines v Berezovsky* [2013] EWCA Civ 784; [2013] 2 Lloyd’s Rep 242 at paras 72-80.

under English law<sup>4</sup>); (iii) separability; and (iv) further aspects yet to be determined (and which will thus give rise to litigation), which could include *compétence-compétence* under section 30, remedies and interest under sections 48 and 49, and the finality of awards under section 58. The effect of the decision in *Enka* (even if correct as a matter of pure conflict of laws analysis) is to give a new weapon to recalcitrant parties who can thereby slow down or scupper altogether London-seated arbitrations. This problem should be remedied by adopting a statutory rule that the proper law of the arbitration agreement is the law of the seat with the only exception being where the arbitration agreement itself expressly chooses a different law (the “Law of the Seat Default Rule”).

6. We address each of those points below. We annex to this response the papers delivered at the BCC Conference on English and comparative law.

### **(B) Point 1 -- Challenges to the Jurisdiction of the Tribunal under Section 67**

#### (B1) Consultation Question 22

7. The Law Commission’s provisional proposal is that section 67 should be reformed to stipulate that (1) where a party has participated in the arbitral proceedings; and (2) has objected to the jurisdiction of the arbitral tribunal; and (3) the tribunal has then ruled on its own jurisdiction in an award, then any subsequent challenge under section 67 should proceed by way of a limited appeal, rather than a *de novo review* or rehearing.<sup>5</sup>
8. We believe that criticisms of the existing approach have been significantly overstated,<sup>6</sup> and disagree with the provisional proposal, for the following reasons.

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<sup>4</sup> See *Fiona Trust v Privalov* [2007] UKHL 40.

<sup>5</sup> Consultation Paper, §8.3, §8.43 and §8.46.

<sup>6</sup> The most prominent academic critics of the existing approach have been the authors of *Merkin and Flannery on the Arbitration Act 1996*: see 6th edition at p.681-685. We are aware of only two judicial critics of the existing approach: Morrison J (in *Tajik Aluminium Plant v Hydro Aluminium AS* [2006] EWHC 1135 (Comm) at [38] and *Fiona Trust & Holding Corp v Privalov* [2006] EWHC 2583 (Comm) at [26]) and Toulson J *Ranko Group v Antarctic Maritim SA (The Robin)* [1998] ADRLN 35. However, in each case, these criticisms predate the seminal decision of the Supreme Court in this area, *Dallah Real Estate & Tourism Holding Co v Pakistan* [2011] 1 A.C. 763, which conclusively established that the rehearing approach is correct and appropriate.

9. **First**, a *de novo* review of the tribunal’s jurisdiction is justified as a matter of principle. It is an essential procedural safeguard, which is necessary to ensure that the parties have in fact consented to arbitration (and to prevent the tribunal from ascribing jurisdiction to itself or, as it is often said, “pulling itself up by its own bootstraps”). This is particularly so given that a jurisdictional challenge may turn on questions of fact as well as questions of law.<sup>7</sup> Because the arbitral tribunal cannot be the final arbiter of its own jurisdiction, it follows that both the tribunal’s findings of fact and its holdings of law in relation to jurisdiction must be open to challenge before the Court. The Court could not discharge that function if it were to be confined by statute to carrying out an “appellate review” of the decision of the tribunal, rather than undertaking a full rehearing.
10. **Second**, the main stated justification for reform is the desire to reduce costs and delay caused by the repetition of arguments and evidence that have already been canvassed before the tribunal.<sup>8</sup> We do not agree with the premise that the existing approach is in fact resulting in significant additional costs or delays. As explained in Section B2 below, the Courts have in fact been astute in using their existing case management powers to avoid such repetition and the Supreme Court has confirmed this to be the position in terms.<sup>9</sup> If there are truly concerns in that respect (*quod non*), they can be addressed by a minor change to the Rules of Court.
11. **Third**, the proposal is out of step with the position that has now been adopted in all leading jurisdictions (including Canada<sup>10</sup>, Australia<sup>11</sup>, Singapore<sup>12</sup>, Hong Kong<sup>13</sup> and

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<sup>7</sup> This point was made by the DAC in its *Report on the Arbitration Bill (1996)* at §143.

<sup>8</sup> See Consultation Paper, §8.30.

<sup>9</sup> *Kabab-Ji v Kout Food Group* [2021] UKSC 48 at [81] “Whether or not a summary procedure is suitable in any particular case must depend on the facts and circumstances of the case. Similarly, if there is to be a trial, the appropriate interlocutory and trial procedure will be case and fact specific. It may be possible, for example, depending upon the nature of the dispute, to dispense with live witness evidence and rely on transcripts of oral evidence already given at the arbitration hearing along with other documentary evidence. It cannot be appropriate to mandate in advance a procedure for all cases, as the claimant suggested.”

<sup>10</sup> *The Russian Federation v Luxtona Lta* [2021] OJ No. 3616; *Lululemon Athletica Canada Inc v Industrial Colour Productions Inc* [2021] BCJ No. 2429.

<sup>11</sup> *Lin Tiger Plastering Pty Lt v Platinum Construction (Vic) Pty Ltd* (2018) 57 VR 576 at [29]-[40]; *IMC Aviaiton Solution Pty Ltd v Altain Khuder LLC* (2011) 38 VR 303.

<sup>12</sup> *PT Tugu Pratama Indonesia v Magma Nusantara Ltd* [2003] SGHC 204; *Insigma Technology Co Ltd v Alstom Technology Ltd* [2009] SLRR 23; and *PT First Media TBK v Astro Nusantara International* [2014] 1 SLR(R) 372 at [162]-[164].

<sup>13</sup> *S Co v B Co* [2014] 6 HKC 421 at [36].

France<sup>14</sup>), where the judgment in *Dallah* is widely regarded as being the gold standard. As noted in the Introduction to this response, the updating of our legislative framework should recognise the fact that there is a global competition between seats which are marketing themselves as safe arbitration seats. Any departure by England and Wales from a rule which has been universally adopted by other leading jurisdictions will require very strong justification indeed, all the more so in circumstances where that rule actually originated in England and Wales. No tenable justifications have been advanced.

12. **Fourth**, the proposed reform would be inconsistent in its application as between parties who seek to challenge the jurisdiction of the tribunal, and those who seek to uphold it. As currently formulated, the reform would require an appellate standard of review to be applied only in cases where the challenging party had previously *objected* to the jurisdiction of the tribunal. But section 67 applies equally in cases where a party seeks to challenge a *negative* ruling by the tribunal that it lacks jurisdiction.<sup>15</sup> There is no logical reason why a different standard of review should be applied in such cases.
13. **Fifth**, the proposal would also require courts to apply different standards of review depending on the extent to which a party had participated in the underlying arbitration. In our view, this would introduce an unnecessary and unwelcome element of additional complexity and uncertainty into the application of section 67. Our concerns in this regard are heightened by the fact that the current proposal fails to define what is meant by “participation” in this context, so as to distinguish between those who would be entitled to a full judicial rehearing under section 72 because they had not participated, but only objected to jurisdiction, and those who would not. Thus:
  - (a) Is it participation for jurisdiction or jurisdiction and merits that counts?
  - (b) Is oral participation needed or do without prejudice written submissions put forward on jurisdiction by the objecting party suffice?

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<sup>14</sup> See the *Pyramids Case*, Cass. civ. 1ère, 6 January 1987, SPP v. Egypt, Rev. arb. 1987, p. 469, note Ph. Leboulanger; JDI 1987, p. 638, note B. Goldman; the *Abela Case*, Cass. civ. 1ère, 6 October 2010, Fondation Joseph Abela Family Foundation v. Fondation Albert Abela Family Foundation, Rev. arb. 2010, p. 813, note F.-X. Train.

<sup>15</sup> See section 67(1) and the commentary in this regard in *Merkin and Flannery* at p.679. An example of a successful section 67 challenge to such a negative declaration is *GPF GP Sarl v Poland* [2018] EWHC 409 (Comm).

(c) If a party simply turns up to object, but takes no part in submissions and/or the merits – is that participation?

(d) Parties and their counsel do all sorts of things – where is the line to be drawn?

14. **Sixth**, the proposed reform would also result in an unjustifiable (and potentially confusing) inconsistency in the standard of review to be applied as between (i) challenges to (some, but not all) domestic awards under section 67; (ii) challenges to the enforcement of foreign awards under section 103; and (iii) challenges to the enforcement of English awards abroad under Article V of the New York Convention. This is because, following *Dallah* (which was itself a decision arising out of a challenge to enforcement under section 103), any challenge under section 103 would be by way of a rehearing. But no equivalent reform is currently proposed in relation to section 103.<sup>16</sup>

(B2) The real concern: procedure not powers

15. More generally, it seems to us that the real concern in relation to section 67 (to the extent that there is one) is about the *procedure* to be adopted by the Court in hearing jurisdictional challenges; not the *powers* of the Court. The former is for rules and courts to decide. It is only the latter that are properly the subject of statutes and statutory reforms.
16. In any event, the concerns that have been identified in the Consultation Paper (and elsewhere) about the procedure that is currently adopted by the courts in relation to challenges to jurisdiction under section 67 have, in our view, been greatly overstated.
17. As the Consultation Paper rightly notes at §8.33, section 67 is only invoked in a relatively small number of cases each year. There were only 15 such applications issued in 2020 to 2021, and only 19 in 2019 to 2020.<sup>17</sup> Not all of the applications that are issued ultimately result in a full hearing before the Court.<sup>18</sup>

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<sup>16</sup> See Consultation Paper, §8.52 – 8.56.

<sup>17</sup> The Commercial Court Report 2020-2021.

<sup>18</sup> The Commercial Court Report for 2020-2021 notes at §3.1.5 that, of the 19 applications that were issued in 2019 to 2020, at least 5 were discontinued and 1 was settled (i.e. c. 32% of the applications issued).

18. Even where a section 67 challenge is determined on its merits, a *de novo* review does not inevitably (or even invariably) result in a full rehearing of all of the evidence and argument that was canvassed before the tribunal. We therefore respectfully suggest that the authors of *Merkin and Flannery* are inaccurate when they claim that the existing approach involves the application of an “*inflexible rule*”, and that the Court is obliged to “*consider the matter of jurisdiction afresh in all circumstances, and by way of a rehearing with oral testimony from expert and factual witnesses, even where there has been a full inter partes hearing before the tribunal ...*”.<sup>19</sup> In our experience as practitioners and former judges of the Commercial Court, this does not reflect the way in which section 67 operates in practice, as has been confirmed by the Supreme Court.<sup>20</sup>
19. The Court already has very considerable flexibility through its existing case management powers to determine the appropriate procedure for the resolution of a challenge under section 67, even where that challenge proceeds as a *de novo* review. This can involve (for example):
- (a) The summary disposal of challenges that have no real prospect of success.<sup>21</sup>
  - (b) The determination of section 67 challenges on the basis of written submissions, without the need for a contested oral hearing.<sup>22</sup>
  - (c) The use (or re-use) of some of the original evidence from the arbitration (e.g. witness statements, expert reports and transcripts of cross-examination).<sup>23</sup>
  - (d) Restrictions on the admission of new evidence or additional disclosure requests.<sup>24</sup>

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<sup>19</sup> See at §67.9.2.

<sup>20</sup> See para. 10 and fn 8 above.

<sup>21</sup> See e.g. *Honeywell International Middle East Ltd v Meydan Group LLC* [2014] EWHC 1344 (TCC); and *Kabab-JI SAL v Kout Food Group* [2022] 1 All E.R. (Comm) 773.

<sup>22</sup> In this regard, the latest edition of the Commercial Court Guide emphasises at §O8.6 the fact that “*The court has the power under CPR r. 3.3(4) and/or CPR r. 23.8(c) to dismiss any claim without a hearing*”.

<sup>23</sup> This procedure was adopted e.g. in *Primetrade AG v Ythan Ltd* [2005] EWHC 2399 (Comm) at para 13; and in *Ecuador v Occidental Exploration and Production Co* [2006] EWHC 345 (Comm): see para 7 in particular; in *Dallah* at first instance there was no oral evidence of fact, although there was of French and Pakistani law: [2008] EWHC 1901 (Comm) at paras 4 and 5.

<sup>24</sup> See e.g. *Central Trading & Exports Ltd v Fioralba Shipping Co (The Kalisti)* [2014] 2 Lloyd’s Rep 449, Males J refused permission for the claimant to adduce evidence before the Court which it had chosen not to deploy before the tribunal. See also *Primetrade AG v Ythan Ltd* (supra) at para 62.

- (e) Even in cases where new evidence is admitted (e.g. new documents or witness statements), such evidence is likely to be met with a very significant degree of judicial scepticism (which may undermine the weight of such evidence) in the absence of a good explanation as to why it was not adduced before the tribunal.<sup>25</sup>
20. The procedure to be adopted by the Court will depend on the nature of the issues raised by the particular jurisdictional challenge. A more extensive evidential inquiry may be required, for example, in cases where a party alleges that it was not a party to the arbitration agreement, than those in which the challenge is based on the scope of the arbitration agreement or reference to arbitration, or the constitution of the tribunal.
21. The Consultation Paper says at §8.40 that there are many cases where the Court should not “*hear the evidence afresh, or entertain new evidence*” and that there are cases where the Court should “*simply consider the evidence put before the arbitral tribunal, including witness statements or transcripts, and rely also on the arbitral tribunal’s findings of fact*”. We agree. But, in our view, this is what already happens in practice and the courts are already astute to ensure that there is no attempt unfairly to adduce new evidence or “grounds of objection”.
22. In our experience, cases in which the Court will require (or permit) a full rehearing (i.e. involving fresh requests for disclosure and the (re-)attendance of factual and expert witnesses for (further) cross-examination) are relatively few and far between. In *Dallah* itself, for example, no additional evidence was called from any witnesses of fact. Expert evidence on French law was heard by Aikens J at first instance, but only because no such expert evidence on French law had been adduced before the tribunal.<sup>26</sup>
23. In our view, the problem that the proposed reform in relation to section 67 seeks to address is therefore more apparent than real. We are concerned, however, that by enshrining a particular type of procedure in statute, the proposed reform would (i) remove the flexibility that is inherent in the existing approach, which enables the Court to adjust its procedure to meet the demands of the particular jurisdictional challenge before it; and

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<sup>25</sup> See e.g. *Electrosteel Castings Ltd v Scan-Trans Shipping & Chartering Sdn Bhd* [2002] EWHC 1993 (Comm) at [23] (per Gross J).

<sup>26</sup> See *Dallah v Pakistan* (Aikens J) [2008] EWHC 901 (Comm); [2008] 2 Lloyds’ Rep. 535 at paras 4 and 5.

(ii) send a very damaging signal that England and Wales pays nothing but lip service to the cardinal principle of *compétence-compétence* (since the practical effect of the proposed rule will be that parties will be forced not to argue jurisdiction before the arbitral tribunal so as to preserve their right to a full hearing thereof by the courts).<sup>27</sup> In that last respect, we respectfully submit that the authors of Merkin and Flannery are fundamentally mistaken when they seek to support the proposed change on the basis that “*when you buy arbitration, you buy the right to get (and the obligation to live with) the wrong answer*” (quoting Lord Justice Kerr): the point at issue on challenges to jurisdiction is *whether* the relevant party has bought into arbitration at all (or into arbitration of that particular subject matter). The principle behind section 67 is the opposite of what Merkin and Flannery suggest; the parties agree that arbitrators may determine their jurisdiction, but the court determines whether the arbitrators’ decision in that respect was correct.

24. If any reform is therefore required (which we doubt, for the reasons set out above), we would suggest – at most – a much more modest reform of the applicable procedural rules, rather than any amendment to section 67 itself. For example, if it was felt necessary to do so, an appropriate amendment could be made to the wording of CPR r. 62.10 (Hearings in Arbitration Claims) or to Practice Direction 62, to make it clear that:

*“In determining the procedure to be adopted for any [re]hearing under Section 67, the Court should take account of the extent to which the party opposing jurisdiction participated and had the opportunity to adduce evidence and the nature of the jurisdictional challenge and such other matters as the Court deems appropriate”.*

25. However, if there is a need to enshrine anything in statute, then it should be to affirm that a hearing under section 67 is, in principle, a *de novo* rehearing, and not an appeal.
26. London is one of the world’s leading centres for international arbitration. We are concerned that, far from enhancing London’s reputation as an arbitral centre, the

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<sup>27</sup> We note in that respect that the principle of *compétence-compétence* does not confer on an arbitral tribunal the right finally to determine its own jurisdiction. It provides that the tribunal has that jurisdiction, but always subject to the final say of the courts of the seat: see Prof. W.W. Park, *The Arbitrator's Jurisdiction to Determine Jurisdiction* in ICCA Congress Series, Vol. 13 pp. 55-113 (attached). The question of which forum should have priority in making that determination is addressed as part of our second submission, in Part C below (rationalisation of avenues of challenge to jurisdiction).

proposed reform to section 67 will have a deleterious effect, by enshrining a particular type of procedure into statute and by effectively neutering the principle of *compétence-compétence* in England and Wales. While in practical terms only a very limited number of cases are likely to be affected; in perspective terms it would send the wrong message internationally and would, in our view, be a retrograde step.

27. As noted in the Introduction to this response, while we agree that the overall regime for challenging jurisdiction under the Act is cluttered and in need of reform, we respectfully submit that the solution does not lie in changing the rule in *Dallah* but in rationalising that regime. We now turn to that second point.

### **(C) The rationalisation of the avenues of challenge to jurisdiction under the Act**

#### **(C1) Consultation Questions 37 & 38**

28. The Consultation Paper does contain a suggestion in that respect, which is summarised in paragraph 11.45, *viz.* to clarify whether the standard of proof for section 9(4) is a good arguable case or the balance of probabilities.

29. Paragraph 11.46 of the Consultation Paper sets out the Law Commission's preliminary view in this regard:

*At present, the cases indicate that the court can decide the matter on the balance of probabilities, but if there is an apparently persuasive assertion that an arbitration agreement exists, then a court might prefer to grant a stay and remit the matter to the tribunal for it to decide in the first instance. We think that this current position is defensible, and its development is a matter best left to the courts.*

30. In our view, the standard of proof for sections 9(1) and 9(4) should be reconsidered as part of a wider review of the English approach to the principle of an arbitral tribunal's *compétence-compétence*, in comparison with the approach adopted in other jurisdictions.
31. This does require a review of the various ways in which the jurisdiction of the arbitral tribunal can be challenged in court.

32. As explained in our response to Consultation Question 22 above, the courts must have the right to determine questions of jurisdiction. This response addresses separate but related issues. First, if both the courts and the arbitral tribunal have the right to determine questions of jurisdiction, which, in principle, should determine the issue first? Secondly, how does one ensure that they are working together in an efficient and cost-effective manner?
33. By way of comparison, we note that in France, full effect is given to the so-called negative effect of *compétence-compétence*. As such, no party can seize a French court of the question whether a certain arbitration agreement is valid or whether it is applicable to a given dispute before an arbitral tribunal is seized or pending arbitral proceedings. This approach has the practical advantage of being clear, but arguably there are circumstances in which it leads to unwarranted delay and wasted costs. There is a limited exception to this pursuant to article 1448 of the French Code of Civil Procedure: where a party has issued proceedings in the French courts and the respondent objects to the court's jurisdiction by invoking the existence of an arbitration agreement, the court will retain its jurisdiction if the arbitration agreement is *manifestly* void or inapplicable to the claim. If the nullity or inapplicability is not manifest, the court does not decide the validity or applicability of the arbitration agreement, and it declines jurisdiction to deal with the merits.
34. A hybrid approach is adopted in Switzerland, where the relevant legal provision in relation to stay of court proceedings is couched in very similar terms to section 9 of the 1996 Act. Article 7 of the Private International Law Act ("PILA") provides:

*If the parties have entered into an arbitration agreement with respect to an arbitrable dispute, any Swiss court before which such dispute is brought shall decline jurisdiction, unless:*

- a. The defendant has proceeded on the merits without reservation;*
- b. The court finds that the arbitration agreement is null and void, inoperative or incapable of being performed; or*
- c. The arbitral tribunal cannot be constituted for reasons that are clearly attributable to the defendant in the arbitration.*

35. According to the Swiss Federal Tribunal’s case law, the negative effect of *compétence-compétence* applies in full if the arbitration clause provides for arbitration in Switzerland. In such circumstances, the power of review is restricted to a summary examination. The reason underlying this rule is expressed by the Swiss Federal Tribunal as being “*to avoid turning Article 7 PILA into an instrument that can paralyse any arbitral procedure*” (ATF 122 III 139). However, we note that this approach does not apply if the seat of the arbitration is not in Switzerland, in which case the Swiss court’s power of review is unrestricted. We express no view on whether this approach is justified, save as to note the overlap between the extent to which the negative effect of *compétence-compétence* is upheld and the power of the court to ultimately have the last word.
36. In contrast to the streamlined approach described in France and Switzerland, we note that there are at least four procedural avenues for challenging jurisdiction under the Arbitration Act 1996, which are addressed in turn below.

(C3) Section 9

37. Section 9 governs applications to the court to stay court proceedings where one party alleges that an arbitration agreement covers the dispute in question. Sections 9(1) and (4) are essentially based on Article II(3) of the New York Convention, which provides that there must be a stay of court proceedings “*unless [the court] finds that the same agreement is null and void, inoperative or incapable of being performed.*” The position summarised in the Consultation Paper in connection with the application of section 9 is indicative of a lack of clarity as to rules of priority in the law of England and Wales.
38. In our submission, the approach in England and Wales should be streamlined so that a clearer rule of priority emerges, enabling the parties to know where they stand, and giving a clear indication of the importance given to international arbitration in this jurisdiction. We therefore propose that section 9 be amended as follows (with proposed amendments in underlined and struck out text):

“(1) A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which that party contends ~~under the agreement~~ is to be referred to arbitration under the agreement may (upon notice to the other parties to the proceedings) apply to the court in which the

proceedings have been brought to stay the proceedings so far as they concern that matter.

... (sub-sections (2) and (3) unchanged)

(4) On an application under this section, if the applicant contends that an arbitration agreement exists and covers the dispute in question, the court shall grant a stay unless satisfied the opposing party shows, on a *prima facie* basis, that there is a very strong probability that the arbitration agreement is may be null and void, inoperative or incapable of being performed, in which case it shall itself proceed finally to determine whether the arbitration agreement is null and void, inoperative or incapable of being performed.”

39. This change would bring the position in England and Wales in line with the position adopted by all leading Model Law jurisdictions (Canada, Hong Kong, Singapore) where it has been held that Article 8 of the Model Law, which has wording identical to Article II.3 of the New York Convention, does not require a full determination of the issue of jurisdiction but only a *prima facie* determination in order to grant a stay: see *Tomolugen Holdings* (Singapore CA, attached) which has a very helpful discussion at para. 25-70 with reference to all these jurisdictions (England, Canada, Hong Kong, Singapore) and which notes that England is out of step with other jurisdictions.

(C4) Sections 32 and 72(1)

40. Section 32 provides a relatively limited power to the court to determine a preliminary point on the “substantive jurisdiction” of the tribunal. The court can only intervene in narrowly confined circumstances: (a) if all the parties agree in writing, which is presumably possible even before an arbitral tribunal is constituted; or (b) the application is made with the permission of the tribunal and the court is satisfied that (i) the determination of the question is likely to produce substantial savings in costs; (ii) the application was made without delay; and (iii) there is good reason why the matter should be decided by the court. However, unless otherwise agreed by the parties, the arbitral tribunal may continue the arbitral proceedings and make an award while an application to the court under this section is pending. This provision does not appear to be used frequently in practice, as indicated by the very limited number of reported cases. It is

respectfully submitted that it is duplicative and serves no purpose and should be repealed as part of the proposed process of rationalisation of avenues of challenge to jurisdiction.

41. Section 72(1) provides that a person who takes no part in arbitral proceedings can challenge jurisdiction *before* an award is issued. Section 72(1) has no equivalent in the Model Law, and in practice appears to be very rarely used. Lord Justice Longmore noted that the court should “*be very cautious about agreeing that [the s.72] process should be so utilised. If there is a valid arbitration agreement, proceedings should not be launched under section 72(1)(a) at all*”: *Fiona Trust and Holding Corp v Privalov* [2007] EWCA Civ 20; [2007] Bus LR 686 at [34]. Given that a party who takes no part in the proceedings may challenge an award under section 67, there is no justification for permitting such a party to trample on the principle of *compétence-compétence*. Accordingly, in our view, this provision should also be repealed.
42. For the avoidance of doubt, we do not propose that section 72(2) (which serves the useful purpose of spelling out that a person alleged to be a party to arbitral proceedings but who takes no part in the proceedings retains its rights to challenge the award under sections 67 and 68) should be repealed. As a consequence of the proposed repeal of section 72(1), it would have to be amended as follows: “Subject to section 73, a person alleged to be a party to arbitral proceedings but who takes no part in the proceedings ~~He also~~ has the same right as a party to the arbitral proceedings to challenge an award [*etc. unchanged*]”.

#### (C5) Section 67

43. This is addressed in Part B above. For the reasons there set out, we respectfully propose that this should remain as the sole route for challenges to jurisdiction, with no change made to the re-hearing rule in *Dallah*.
44. The upshot of this proposed rationalisation of the avenues of challenge to jurisdiction would be that:
  - (a) Where the party challenging jurisdiction has commenced court proceedings in England and Wales, those proceedings will normally be stayed save where the

arbitration agreement is manifestly null and void etc. with the issue of jurisdiction going to the tribunal;

- (b) The tribunal’s determination of its own jurisdiction (whether following a court stay under section 9 or not) will then be challengeable in court under section 67 (and section 67 only).

45. This simple and streamlined regime would have the benefit of clarity and, even more importantly, avoid the inefficiencies arising from the court’s current application of section 9 (which results in a case management decision having to be made in every case as to which forum ought to have priority to determine jurisdiction, court or tribunal). The proviso proposed to section 9(4) would also mean that the matter would not proceed to the tribunal when the arbitration clause is manifestly inapplicable thus providing for flexibility and avoiding wasted costs in clear cases of lack of jurisdiction.

#### **(D) The law applicable to the arbitration agreement**

##### *(D1) Consultation Question 37, paragraph 11.8*

- 46. Question 37 of the Consultation Paper refers to a number of suggestions for review which have not been shortlisted for further action. The question asks consultees whether they consider that any such suggestion should be reconsidered in full and if so why.
- 47. One such suggestion recorded at paragraph 11.8 is that there should be a default rule that the law governing the arbitration agreement is the law of the seat, save where the parties have expressly agreed otherwise in the arbitration agreement itself. That suggestion was made by some of those subscribing to this response (viz. Lord Hoffmann, Sir Richard Aikens, Salim Moollan KC and Ricky Diwan KC) and their Note of 7 June 2022 on the point is annexed to the present response for the Commission’s ease of reference.
- 48. The Consultation Paper gives a number of reasons as to why the suggestion had not been retained for review.
  - a. First, the question is framed in terms of “whether *Enka v Chubb* was wrong”.<sup>28</sup>

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<sup>28</sup> Paragraph 11. 8.

- b. The *Enka v Chubb* approach is then described as one whereby the Supreme Court decided unanimously (on this point) that an express or implied choice of law to govern the main contract carries across as an implied choice of law to govern the arbitration agreement.<sup>29</sup>
- c. Reference is then made to Scottish legislation which has a default rule that, absent any specification in the arbitration agreement, then the law of the arbitration agreement is the law of the seat, “unless the parties agree otherwise.”<sup>30</sup> The Consultation Paper records (it is submitted, correctly) that given that *Enka v Chubb* says that where the parties expressly or impliedly chose the applicable law of the main contract, that is also an implied choice of the proper law of the arbitration agreement, and so is thus “an agreement otherwise”, therefore a default rule such as that of Scots law would not apply. Thus, if the parties have chosen a non-English law as the applicable law of the main contract, that would also be the proper law of the arbitration agreement.<sup>31</sup>
- d. The question posed by the Law Commission was thus whether there ought to be a rule that the proper law of the arbitration agreement will be the law of the seat with the only exception being where the arbitration agreement itself expressly chooses a different law.<sup>32</sup> (We refer to that suggestion in this response as “the Law of the Seat Default Rule”, as noted in Part A above).
- e. The Law Commission concluded provisionally that the DAC deliberately omitted conflicts of laws from the Act and that it was not yet persuaded that it needed a new regime departing from *Enka v Chubb*.<sup>33</sup>
49. Those provisional reasons given by the Commission for not adopting the Law of the Seat Default Rule were comprehensively addressed on the third panel of the BCC Conference and are not reiterated verbatim in this response: the relevant paper<sup>34</sup> is annexed thereto and we would respectfully ask the Commission to have regard to the same in its deliberations.

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<sup>29</sup> Paragraph 11. 9.  
<sup>30</sup> Paragraph 11. 11.  
<sup>31</sup> Paragraph 11. 11.  
<sup>32</sup> Paragraph 11. 11.  
<sup>33</sup> Paragraph 11.12.  
<sup>34</sup> By Salim Moollan KC.

50. As there explained, we remain of the view that the Law of the Seat Default Rule should be adopted for the following reasons.
51. First and importantly, it is submitted that the relevant question is not whether the decision in *Enka v Chubb* was wrong. The proposed change to the law does not impugn the decision in *Enka* in terms of pure conflicts of law rules. We think it fair to say that the Supreme Court in *Enka* was to an extent hamstrung by the historical baggage of prior case-law and was thus driven to analyse the issue in terms of pure conflict of laws rules. But, as Lord Mustill noted when the 1996 Act was passed, “[c]onceptually ... the Act marks a radical change of direction. No longer are the internal rules to be derived by analysing the contracts between the parties inter se and between themselves and the arbitrators. The arbitral process is still consensual to the extent that the proceedings would not take place but for the agreement to arbitrate. But by making this agreement the parties contract into a framework, not chosen by themselves but imposed by Parliament, save only to the extent that they avail themselves of the opportunity to depart from the semi-mandatory provisions.” (Mustill & Boyd, Companion Volume in Part I.G.6.)<sup>35</sup> The question should thus be one of legislative policy: what policy makes sense for London as a seat, and thus what should be the framework set by Parliament into which Parties who choose London as a seat will therefore opt. That is a question singularly within the remit of the Law Commission.
52. Once that correct question is posed, the answer is (it is submitted) inescapable. The default applicability of the *lex contractus* arising from *Enka v Chubb* means that in a vast number of London seated arbitrations (in which the parties have expressly or impliedly chosen a foreign law as the applicable law of the main contract), all aspects of the arbitration agreement, from arbitrability to the scope of the arbitration clause will be governed by that foreign law. This creates considerable substantive legal uncertainty as well as practical issues for parties which choose London as a seat for their arbitration and it goes against the evidence of market practice.
53. First, there is the issue of substantive legal uncertainty. The result of *Enka v Chubb* is that in every London seated arbitration with an express or implied choice of foreign substantive law, the arbitration agreement will be governed by that foreign law, unless

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<sup>35</sup> See further in that respect, Salim Moollan, Some Thoughts on Emmanuel Gaillard’s “Vertus de la règle matérielle” in *Liber Amicorum Emmanuel Gaillard* (to be published in 2023), attached.

“the validation principle” is invoked. This, in turn, means that issues such as arbitrability or the scope of the arbitration clause will be governed by that foreign law:

- a. Challenging the arbitrability of a dispute is one of the most common ways for recalcitrant parties to impugn the jurisdiction of arbitrators and renege on their agreement to arbitrate. English law has developed a robust approach to discourage such attempts,<sup>36</sup> which contributed to London’s attractiveness as a safe seat of arbitration. However, in the post *Enka v Chubb* world, recalcitrant parties will be able to rely on alleged peculiarities of the substantive applicable law of the contract as making certain matters unarbitrable. This is a real risk, particularly when certain foreign laws take a narrower approach to arbitrability than English law<sup>37</sup> and/or do not have well-developed precedent in this respect which creates uncertainty.
  - b. The same is true with respect to the scope of the arbitration clause. The House of Lords in *Fiona Trust* did away with the former literalist approach to the interpretation of arbitration clauses and established a presumption of “one stop adjudication.” Post *Enka v Chubb*, these principles will no longer find any application if the proper law of the arbitration agreement follows the foreign law expressly or impliedly chosen by the parties for the main contract. Parties will have to look instead to the relevant foreign law which may or may not contain any equivalent principles assisting in having a safe, comprehensive and efficient arbitration.
54. As to practical issues, the implication of *Enka v Chubb* is that where foreign law governs the arbitration clause and there is a challenge, foreign law evidence will now routinely be needed before the Commercial Court on issues of arbitrability and interpretation of the arbitration clause, including who is bound by it and the scope of such clause. While our courts are undoubtedly well versed in hearing evidence of foreign law, there is nothing to be gained in creating this possibility in every challenge to jurisdiction

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<sup>36</sup> See for instance *Tamil Nadu Electricity Board v ST-CMS Electric Company Private Ltd* [2007] EWHC 1713 (Comm), Cooke J., giving short shrift to a party’s attempt to rely on the substantive *lex causae* (Indian law) to argue that a contractual dispute as to the applicable tariff payable for electricity was not arbitrable because of the existence of statutory mechanisms for the settlement of tariff disputes (on terms materially different from those agreed in the contract) under Indian law.

<sup>37</sup> For instance, on the facts of the *Tamil Nadu* case (supra), the Indian Supreme Court has very recently reasserted that the existence of statutory mechanisms for the settlement of tariff disputes does render a contractual tariff dispute unarbitrable under Indian law: see *Gujarat Civil Supplies v. Mahakali Foods* (31 October 2022, attached).

involving a foreign law contract, as the decision in *Enka* has done; and the resulting inefficiencies in additional time and costs are obvious and unnecessary.

55. Furthermore, there is evidence that the market practice in London favours arbitration rules providing that the law of the seat governs the arbitration agreement, which is the opposite solution to that retained in *Enka v Chubb*. Indeed, para. 11.9 of the Consultation Paper refers to Article 6 of the LMAA Terms 2021 and to Article 16.4 of the LCIA Rules 2021. Yet, importantly, those rules now find no application post *Enka*. Because the parties' choice of foreign substantive law for the main contract is to be treated as an implied choice made by the parties as the proper law of the arbitration agreement, that specific choice made in the contract itself will oust generic provisions in arbitral rules such as Article 6 of the LMAA Terms and Article 16.4 of the LCIA Rules.<sup>38</sup> This means that the problems created by *Enka* (noted above) cannot be resolved through amendments to arbitral rules, and can only be resolved through a statutory change.<sup>39</sup>
56. Turning to the second rule in *Enka*, the effect of the Supreme Court's interpretation of section 4(5) of the Act<sup>40</sup> is that an implied choice of foreign law as the proper law of the arbitration agreement will automatically displace the non-mandatory provisions of the Act where the provision is "substantive" as opposed to being "procedural".<sup>41</sup> The consequence is the potential for unnecessary litigation about which non-mandatory provisions are "substantive" or "procedural."
57. There is a genuine prospect of having to argue this distinction on potentially every non-mandatory provision of the Act in future cases.

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<sup>38</sup> This is addressed in some more detail in the short attached note (entitled: 'Change to Arbitral Rules not an answer').

<sup>39</sup> Lord Hoffmann takes the contrary view that such amendments could be effective, where they would have the effect of constituting a specific agreement as to the law of the arbitration agreement which would prevail over the choice of law clause in the written document. But it is common ground that (i) there is doubt on the question, which in itself justifies dealing with this in the statute; and (ii) that it would in any event be unrealistic to expect international institutions such as the ICC or UNCITRAL to change their global rules to resolve what is an essentially English problem of very recent creation.

<sup>40</sup> Section 4(5) reads as follows: "*The choice of a law other than the law of England and Wales or Northern Ireland as the applicable law in respect of a matter provided for by a non-mandatory provision of this Part is equivalent to an agreement making provision about that matter. For this purpose an applicable law determined in accordance with the parties' agreement, or which is objectively determined in the absence of any express or implied choice, shall be treated as chosen by the parties.*"

<sup>41</sup> This reverses the pre-*Enka v Chubb* position whereby that there had to be a choice of law with regard to the specific provision of the Act which the parties agree is not to apply (Longmore LJ in *C v D* [2008] Bus LR 943 at para. 19 (applied by Burton J in *NIOC v Crescent* [2016] 2 Lloyds' Rep. 146 at paras. 12-18)).

58. Yet, the distinction between what is “substantive” and what is “procedural” is a notoriously vexed question. Indeed, the Supreme Court itself in *Enka v Chubb* expressly recognised (in the words of the DAC) that it was an “*extremely difficult and complex*” one.
59. There are numerous examples of potentially problematic provisions which are not evidently “procedural” or “substantive”. Prime examples are section 48 (which deals with remedies) or section 49 (which deals with interest). While the Supreme Court in *Enka* stated that other provisions such as section 30 (which sets out the principle of *compétence-compétence* but is non-mandatory) and section 58 (which sets out the principle of finality of arbitral awards but is also non-mandatory) are “procedural”,<sup>42</sup> those specific pronouncements must be *obiter* – sections 30 and 58 were not at issue in *Enka*. It is, with respect, not self-evident that those sections are “procedural”. The *Enka* court recognised that the concept of “separability” is not procedural but substantive, but it is by no means obvious why *compétence-compétence*, a principle closely entwined with separability, should be treated any differently. Similarly, it is not clear why the question of whether an award creates final substantive rights should not be considered as substantive. Under English law *res judicata* is considered to be partly procedural and partly substantive.<sup>43</sup>
60. Third and relatedly, the all-important question of separability of the arbitration clause, provided for at section 7 of the Act, will now routinely be governed by foreign law as a result of the Court holding in *Enka v Chubb* that section 7 of the Act is a substantive (non-mandatory) provision.
61. The decision in respect of section 7 paired with the default applicability of the *lex contractus* means that unknown principles which may be adduced by way of foreign law evidence will govern this central pillar of international arbitration rather than the well-established principles developed by the English courts (most recently in *Fiona Trust*) to

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<sup>42</sup> *Enka* at para. 91-92.

<sup>43</sup> See *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46, [2014] AC 160 at paras 17-26 per Lord Sumption. All the other Justices agreed on his exposition of the law in relation to *res judicata*.

protect English-seated arbitrations. If one takes the example of a foreign law which does not recognise separability:<sup>44</sup>

- a. Each and every allegation against the main contract - such as allegations of mistake, fraud or corruption - will fall to be entirely relitigated before the English Court as they will go to the heart of the arbitrators' jurisdiction as well, just as they were alleged to do in *Fiona Trust*.
  - b. The arbitration may have otherwise proceeded under arbitration rules which call for application of such principle (see e.g. ICC Rules 2021 Article 6(9); LCIA Rules 2020 Article 23.2; UNCITRAL Rules 2010 Article 23(1)). But the *Enka* decision will mean that one gets into difficult (and unnecessary) arguments on which regime (that of the chosen proper law of the arbitration agreement or the provisions of the chosen arbitration rules) will prevail; and/or whether the peculiar concept of (non)-separability under the chosen foreign law is mandatory or not under that foreign law?
62. This also creates conceptual issues in that it places separability on a par with matters of the scope of the arbitration agreement (e.g. scope *ratione materiae* or *ratione personae* of the arbitration clause) which everyone accepts may well be governed by a foreign law in an English-seated arbitration.
63. However, in all arbitration rules,<sup>45</sup> and in most countries' arbitration laws,<sup>46</sup> separability is treated as a part of the concept of *compétence-compétence*. Yet, it could be said that the very reason why a separate conflict of laws analysis is required for the arbitration agreement (separate from that which one would apply to the main contract) is separability; and the *Enka* Supreme Court took into account the effect of section 7 of the

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<sup>44</sup> As was alleged to be the case of Iranian law in *NIOC v. Crescent* [2016] 2 Lloyds' Rep. 146, a case in which such attempts to relitigate were shut out applying *Fiona Trust*. That decision was specifically overruled by *Enka*.

<sup>45</sup> See e.g. UNCITRAL Model Law, Article 16; UNCITRAL Arbitration Rules 2010, Article 23(1); LCIA Rules 2020 Article 23.2; ICC Rules 2021, Article 6.

<sup>46</sup> e.g. in France the concept of separability is subsumed in the wider material rule (*règle matérielle*) of '*autonomie de la clause d'arbitrage*' which applies to every arbitration seated in France (and which the French courts apply whenever they hear an international arbitration matter, irrespective of its seat: see most recently the decision of the *Cour de Cassation* No 20-20.260 of 28 September 2022: *Kabab-Ji v Kout Food Group*). In Switzerland, Article 178(3) of the Swiss Private International Law Act postulates a material rule of Swiss law that "[t]he validity of an arbitration agreement may not be contested on the grounds that the main contract is invalid (...)". While it is generally thought that that provision could be contracted out of, that cannot happen through a general choice of law clause in the main contract.

Act in its conflict of laws analysis (at para. 40-41) only to reach a conclusion that would disapply that premise in a great number of cases.

64. To conclude, the Law of the Seat Default Rule is necessary to maintain the standing of London as a safe and leading seat for international arbitration.
65. The question is one of policy, and the policy reasons for the law of the seat being the default rule for the proper law of the arbitration agreement are overwhelming: by choosing London as a seat, the parties opt into the framework of a neutral and efficient seat, i.e. one that will protect their arbitration agreement and make it efficient. This includes *inter alia* pro-arbitration rules as to (i) arbitrability; (ii) scope (including the principle of one-stop adjudication); and (iii) separability. There is no sense in displacing that carefully constructed system automatically to the benefit of a foreign law of unknown content, while concurrently handing a new toolbox for recalcitrant parties to slow down or altogether scupper London-seated arbitrations.
66. There is a final question as to the remit of the proposed rule, i.e. should the Law of the Seat Default Rule apply only to arbitrations seated in England and Wales (which is the remit of the decision in *Enka*) or should it apply more broadly to every court application under the Act, including applications for the enforcement of foreign awards under section 103 of the Act. We are of the view that it should have that broader application. This would have the benefit of clarity and avoid further arguments as to the law applicable to the arbitration agreement in enforcement proceedings. It would put paid to any argument that the proposed rule in favour of the law of the seat is a parochial one in favour of English law (which it is not). It would resolve problems such as those which arose in *Kabab-ji v Kout Food*<sup>47</sup>, where – in relation to a French-seated arbitration – the English courts applied English law to the question of the validity of the arbitration clause (as being the implied choice of the parties as it was the applicable law of the main contract) rather than applying French law, resulting in different outcomes as to the validity of the award in England and in France.

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<sup>47</sup> [2021] UKSC 48.

(D2) Consultation Question 28

67. Question 28 asks consultees whether they think that section 7 of the Act (separability of arbitration agreement) should be mandatory, and why.
68. For the reasons set out above, we regard this reform is an absolute minimum to address the effects of *Enka v Chubb* detailed above. It may not be necessary in practice once the Law of the Seat Default Rule is adopted, but it would be safer to adopt it.
69. Similarly, we are of the view that, while this may not be strictly necessary once the Law of the Seat Default Rule is adopted, section 4(5) should be amended to revert to the position which existed prior to the decision in *Enka*.

London, 15 December 2022

## Annex 1

### Further members of Brick Court Chambers referred in paragraph 1

Sir Gerald Barling	Craig Morrison
Sir Paul Walker	Georgina Petrova
Simon Thorley KC	Jonathan Scott
Richard Lord KC	Charlotte Thomas
Fionn Pilbrow KC	Sarah Bousfield
Klaus Reichert SC	Ben Woolgar

## Annex 2

### List of Attachments

1. Papers delivered at the Brick Court Chambers Commercial Conference
2. Prof WW Park, *The Arbitrator's Jurisdiction to Determine Jurisdiction* in ICCA Congress Series, Vol 13 pp55-113
3. *Tomulgen Holdings* (Singapore CA)
4. Note of 7 June 2022 (Lord Hoffmann, Sir Richard Aikens, Salim Moollan KC, Ricky Diwan KC)
5. Salim Moollan KC, 'Some thoughts on Emmanuel Gaillard's "Vertus de la règle matérielle"' in *Liber Amicorum Emmanuel Gaillard* (to be published in 2023)
6. *Gujarat Civil Supplies v Mahakali Foods* (31 October 2022)
7. Note: 'Change to Arbitral Rules not an answer.'