AMENDED NOTE FOR THE LAW COMMISSION

ON RECOMMENDATION 19 OF ITS FINAL REPORT ON THE REVIEW OF THE ARBITRATION ACT 1996 AND CLAUSE 1 OF THE DRAFT BILL

Introduction

1. The undersigned, together with other members of Brick Court Chambers and former members of the senior judiciary, have engaged with the Law Commission over the past fifteen months in the lead up to, and during, the consultation process on the review of the Arbitration Act 1996 ("the 1996 Act"), in particular on the question of the law applicable to the arbitration agreement. In particular:

    (a) Sir Richard Aikens and Salim Moollan KC spoke to Sir Nicholas Green, Prof. Sarah Green and Nathan Tamblyn on 20 May 2022 to raise their concerns about the consequences of the decision in *Enka v Chubb* [2020] UKSC 38 ("*Enka*") on English arbitration law, and on the attractiveness of England and Wales as a seat for international arbitration.

    (b) A note on the "potential Reform of the [Act] arising out of the recent interpretation of Section 4(5) of the Act in *Enka*" by Lord Hoffmann, Sir Richard Aikens, Salim Moollan KC and Ricky Diwan KC was sent to the Commission on 7 June 2022, proposing "[the] introduc[tion] [of] a default rule in the Act according to which the law applicable to the arbitration agreement for all arbitrations seated in England or Wales will be that of England and Wales, save where the parties expressly stipulate otherwise in the arbitration agreement itself".

    (c) A formal response to the Commission's First Consultation Paper was filed on 15 December 2022, reiterating that proposal.

    (d) A formal response to the Commission's Second Consultation Paper was filed on 26 May 2023, supporting the Commission's adoption of that proposal in its Second Consultation Paper.

2. We reiterate our gratitude to the Commission for taking the time to grapple with this difficult issue of arbitration law, and for making the formal recommendation in favour of this legislative change now contained in Recommendation 19 of its Final Report on the review of the Act and in clause 1 of the draft Bill contained therein ("the Bill").

3. We write to raise very serious and strong concerns regarding the proposed new section 6A(3) contained in clause 1(2) of the Bill. It would provide that the new default rule in favour of the seat contained in the proposed new section 6A(1) would only apply to "*arbitration agreements entered into [after] the day on which section 1 of the [new] Arbitration Act 2023 comes into force*":

(a) To our knowledge, the issue of prospective application (whether from that point in time, or as a point to be discussed generally) was never raised in the consultations, and the rationale therefor is not canvassed at all in the Final Report. So far as we can ascertain, it is only mentioned in para. 12.26 of the Final Report which states that *"[s]ome consultees suggested that any reform which departs from Enka v Chubb should apply only to arbitration agreements entered into after the reform takes effect, in case parties had organised their existing affairs by reference to Enka v Chubb"*, with no analysis or explanation provided as to why that view should be accepted. We do not raise this as a criticism: we understand the severe time constraints the Law Commission has been working to, especially given the limited Parliamentary time left for enactment of the legislation. But we would hope that the Commission will readily and urgently change course once it takes the time properly to reflect on the issue, for the following reasons.

(b) The avoidance of retroactive application is of course a valid concern in the context of all legislation. In the context of arbitration legislation, that concern has always been dealt with by avoiding retroactive application to **arbitrations already commenced as of the date of coming into force of the new legislation**, not to arbitration agreements already concluded but under which no proceedings have yet been commenced as of that date. The 1996 Act itself, in introducing changes of much wider purport, made them applicable to all *"arbitral proceedings commenced on or after [the date on which this Part [1] of the Act came into force]"*: see section 84 of the Act. The DAC Report on the Arbitration Bill explained this transitional provision as follows (at paragraph 315): *"This Clause sets out the general proposition, namely that the Bill will apply to arbitral proceedings commenced after the legislation comes into force, whenever the arbitration agreement is made. There are respectable precedents for this, since the Arbitration Acts 1889, and 1934 contained a like provision. The 1950 Act, of course, was not a precedent, since this was a consolidating measure. We consider this to be a useful provision, since some arbitration agreements have a very long life indeed (for example, rent review arbitration agreements under leases) and it would be most unsatisfactory if the existing law and the proposed legislation were to run in parallel (if that is the right expression) indefinitely into the future."* The exact same rationale applies here, and there is no basis for departing from these longstanding precedents in the arbitration field. We further note in that respect that the Arbitration (Scotland) Act 2010 which, as noted by the Commission, introduced a rule similar to that to be introduced by clause 1 of the Bill, has the same transitional provision: see section 36 of the Scots Act.

(c) Nor is there any reason or basis to single out the applicable law provision for prospective application based on the date of conclusion of the arbitration agreement, as the Bill appears to do.[1] As just noted the whole of Part 1 of the 1996 Act (which contains both substantive and procedural provisions, as recognised for instance in *Enka* itself) was given limited retrospective application – with the relevant limitation being by reference to the date of commencement of arbitrations, as was section 6 of the Scots Act (which is essentially identical to clause 1 of the Bill). What is more, as noted at a conference held on 18 September 2023 by Herbert Smith Freehills and the LCIA following an intervention by the LCIA Director-General, the introduction of a similar provision in the LCIA Rules in 1998 (providing that the law applicable to the arbitration agreement would be the law of the seat in the absence of contrary agreement) was made applicable in accordance with the usual rule, i.e. to all *arbitrations commenced* after the date of the new version of the LCIA Rules, irrespective of the date on which *the arbitration agreements were concluded*. By contrast, the emergency arbitrator provisions introduced by the LCIA in 2014 were not made applicable to arbitration agreements concluded before the date of the new version of the LCIA Rules because they were deemed to be too significant of a change. On that evidence of market practice (also noting the respective dates of the change, 1998 for applicable law and 2014 for emergency arbitrators), there might be an argument for making clause 8 of the Bill (which introduces the concept of emergency arbitrators into the English legislative framework for the first time) applicable only to arbitration agreements concluded after the date of entry into force of the 2023 Act; but certainly not Clause 1. (We do not believe that either should depart from the usual rule.) We further note in that respect that Lord Mustill, in *The Boucraa* [1994] 1 AC 486, expressed some doubts as to whether the categorisation of legislative changes as "substantive" or "procedural" to assess the extent to which retrospectivity would be acceptable was of limited assistance in this area of the law ([1994] 1 AC 486 at 527G to 528C), stating in particular that *"such a discussion would be unprofitable, partly because the distinction just mentioned may be misleading, since it leaves out of the account the fact that some procedural rights are more valuable than some substantive rights, and partly because I doubt whether it is possible to assign rights such as the present unequivocally to one category rather than another"*. Thus, this would provide no basis for distinguishing the change in clause 1 (as "substantive") from those in the other clauses of the Bill (as "procedural") – even if that were a correct categorisation.

(d) This is all the more so, where – as here – the question of which law governs the arbitration agreement has never been a settled one in English law and has not been made any more predictable by the Supreme Court's decision in *Enka*. In the words of the Commission, *"[c]onsultees said that the law in*

[1] We say "appears to do", as it is not clear what transitional application is intended for the other provisions of the Bill, the relevant clauses being silent in that respect, as is the clause of the Bill entitled "Commencement and transitional provision" (Clause 17).

Enka v Chubb is complex and unpredictable. We note that the Supreme Court itself was divided both on the law and how to apply the law to the facts of the case before it. The current law risks being an opportunity for satellite argument, which in turn is productive of unnecessary cost and delay".[2] The legislative change being made is thus hardly taking away any clear or vested rights. It is introducing clarity where there was none.

(e) Prospective application by reference to the date of conclusion of future arbitration agreements would defeat the very purpose of the change, and the strong policy reasons in favour of it, which have been accepted by the Law Commission. The vast majority of cases that will be coming before the courts for the next decade will be based on pre-legislation arbitration agreements, and a great many after that as well. In principle it cannot be desirable to allow two different regimes to co-exist for such a long and indefinite period of time: on one hand the overly complicated regime set out in *Enka*, with all the potential problems it raises in relation to satellite litigation; and the simplified regime of the new default rule on the other.

(f) The Bill should instead use the same transitional provisions as the 1996 Act, for the reasons given by the DAC quoted in paragraph 3(b) above, and be made applicable to all *"arbitral proceedings commenced on or after the date on which the Arbitration Act 2023 comes into force."*, and that transitional provision is in any event required for all the provisions of the Bill, to avoid arguments being raised – and possible litigation – over the application of other changes in the Act, as happened in *The Boucraa* (supra) in relation to the change introduced by the Courts and Legal Services Act 1990 to the Arbitration Act 1950 (which introduced a new section 13A, giving a power for arbitrators to dismiss arbitration claims for want of prosecution).

(g) The point made by "some consultees" recorded in paragraph 12.26 of the Final Report (supra) does not withstand scrutiny and flies in the face of the above. In addition, the Bill would benefit from an overall transitional provision in line with section 84 of the 1996 Act

4. Each of these points is developed briefly below. We also raise a separate point for the Commission's consideration as to whether the new section 6A should be made mandatory (in the same way as the new section 23A: see clause 2(3) of the Bill) in order to avoid any lingering argument that the section could be displaced by a contrary choice of substantive law for the contract through the application of section 4(5). We have formed no concluded view on this given the urgency with which we are writing to the Commission (as to which see paragraph 5 immediately below), but would tend to think that one should take that step (i.e. make section 6A mandatory) to be on the safe side.

5. We understand that the Bill needs to be sent to Parliament in short order so as to stand a chance of being passed during the current Parliament and have accordingly

[2] Final Report Summary at para. 1.138.

expedited the preparation and communication of the present Note. For that reason it is only signed at this stage by Lord Hoffmann, Lord Phillips, Lord Mance Sir Richard Aikens, Sir Christopher Clarke, Salim Moollan KC, Ricky Diwan KC and Emilie Gonin. We have little doubt, however, that the other signatories to our formal responses to the Commission of 15 December 2022 and 26 May 2023 will also support the contents thereof, and we are now taking the necessary steps to consult them and will write to you in the coming days to confirm the same.

6. We now turn to address the points in paragraph 3 above, and the point on whether the new section 6A should be made mandatory in sequence.

(1) The issue of whether to limit application of the legislative change on applicable law to arbitration agreements concluded after the date of enactment was not raised in consultations and is the subject of no analysis in the Final Report

7. To our knowledge, the question of whether to limit application of the legislative change on applicable law to arbitration agreements concluded after the date of enactment was never raised as an issue in the consultations:

(a) There is nothing in that respect in the summary of the second consultation paper;

(b) There is nothing in the second consultation paper itself, which simply explained the Commission's proposal as follows:

> 2.76 For these reasons, helpfully developed by consultees in their responses and discussions with us, we provisionally propose that a new rule be introduced into the 1996 Act to the effect that the law of the arbitration agreement is the law of the seat, unless the parties expressly agree otherwise in the arbitration agreement itself.
> 2.77 This proposed new rule, applying the law of the seat, has the virtues of simplicity and certainty. The law governing the matrix agreement would be irrelevant. Any doubt over which law governs the matrix agreement would not infect the question of which law governs the arbitration agreement. The new rule would apply whether the arbitration was seated in England and Wales, or elsewhere. It would apply whether the seat was chosen by the parties, or otherwise designated. Where the arbitration is seated in England and Wales, the new rule would avoid the problems which arise from *Enka v Chubb* – unless the parties explicitly agreed otherwise, in which case the parties must be taken as facing the consequences with eyes wide open. The ability to agree otherwise preserves party autonomy.

8. That question is the subject of no analysis in the Final Report:

(a) The Recommendation made by the Commission (Recommendation 19, at para. 12.77) is simply as follows:

> We recommend that the Arbitration Act 1996 be amended to provide that the arbitration agreement is governed by the law of the seat, unless the parties expressly agree otherwise.

(b) However the proposed new section 6A(3) contained in clause 1(2) of the Bill provides that the default rule regarding the law applicable to the arbitration agreement only applies prospectively to arbitration agreements entered into on the day on which the amendment to the 1996 Act comes into force. It reads as follows:

> (1) The Arbitration Act 1996 is amended as follows.
> (2) After section 6 insert— "6A Law applicable to arbitration agreement
> ……
> (3) This section does not apply in relation to an arbitration agreement that was entered into before the day on which section 1 of the Arbitration Act 2023 comes into force.

(c) The Explanatory Notes to the Bill contain no explanation at all for the introduction of subclause (3).

(d) As noted above, the only mention of the rationale for this is at para. 12.26 of the Final Report, and reads as follows:

> Some consultees suggested that any reform which departs from *Enka v Chubb* should apply only to arbitration agreements entered into after the reform takes effect, in case parties had organised their existing affairs by reference to *Enka v Chubb*.

9. This is an incredibly weak justification for the proposed introduction of prospective application, as explained below. But for the purposes of this first point, we simply note that the Final Report does not provide any analysis of this proposal or any explanation as to why it should be accepted – whether by reference to past legislative practice or case law on retroactivity in the field of arbitration, or otherwise. As already noted, we do not raise this as a criticism: we understand the severe time constraints the Law Commission has been working to, especially given the limited Parliamentary time left for enactment of the legislation. But we would hope that the Commission will readily and urgently change course once it takes the time properly to reflect on the issue.

(2) The proposed rule does not follow consistent legislative precedent in the field of arbitration which is grounded on clear and sound principles (most recently reiterated by the DAC)

10. The avoidance of retroactive application is of course a valid concern in the context of all legislation. In the context of arbitration legislation, that concern has always been dealt with by avoiding retroactive application to **arbitrations already commenced as of the date of coming into force of the new legislation**, not to

arbitration agreements already concluded but under which no proceedings have yet been commenced as of that date.

11. The 1996 Act itself, in introducing changes of much wider purport, made them applicable to all *"arbitral proceedings commenced on or after [the date on which this Part [1] of the Act came into force]"*. Section 84 of the 1996 Act provides relevantly as follows:

> **Transitional provisions**
>
> (1) The provisions of this Part [i.e. Part I of the Act] do not apply to arbitral proceedings commenced before the date on which this Part comes into force.
> (2) They apply to **arbitral proceedings commenced on or after that date under an arbitration agreement whenever made**.
> …."
> (emphasis added)

12. The DAC Report on the Arbitration Bill explained this transitional provision as follows (at paragraph 315):

> This Clause sets out the general proposition, namely that the Bill will apply to arbitral proceedings commenced after the legislation comes into force, whenever the arbitration agreement is made. **There are respectable precedents for this, since the Arbitration Acts 1889, and 1934 contained a like provision.** The 1950 Act, of course, was not a precedent, since this was a consolidating measure. **We consider this to be a useful provision, since some arbitration agreements have a very long life indeed (for example, rent review arbitration agreements under leases) and it would be most unsatisfactory if the existing law and the proposed legislation were to run in parallel (if that is the right expression) indefinitely into the future.**

13. The exact same rationale applies here, and there is no basis for departing from these longstanding precedents in the arbitration field.

14. We further note in that respect that the Arbitration (Scotland) Act 2010 which, as noted by the Commission introduced a rule similar to that to be introduced by Clause 1 of the Bill, has the same transitional provision: see section 36 of the Scots Act, which provides relevantly as follows:

> "**Transitional provisions**
>
> This Act does not apply to an arbitration begun before commencement.
> This Act otherwise applies to an arbitration agreement whether made on, before or after commencement."

(3) There is no reason or basis to single out the applicable law provision for prospective application based on the date of conclusion of the arbitration agreement

15. The Bill appears to single out the applicable law provision for prospective application based on the date of conclusion of the arbitration agreement. We say "appears to", as it is not clear what transitional application is intended for the other provisions of the Bill, the relevant clauses being silent in that respect, as is the clause of the Bill entitled "Commencement and transitional provision" (clause 17).

16. There is no reason or basis to do so. As just noted the whole of Part 1 of the 1996 Act (which contains both substantive and procedural provisions, as recognised for instance in *Enka* itself[3]) was given limited retrospective application – with the relevant limitation being by reference to **the date of commencement of arbitrations**, as was section 6 of the Scots Act (which is essentially identical to clause 1 of the Bill).

17. What is more, as noted at a conference held on 18 September 2023 by Herbert Smith Freehills and the LCIA following an intervention by the LCIA Director-General, the introduction of a similar provision in the LCIA Rules in 1998 (providing that the law applicable to the arbitration agreement would be the law of the seat in the absence of contrary agreement) was made applicable in accordance with the usual rule, i.e. to all *arbitrations commenced* after the date of the new version of the LCIA Rules, irrespective of the date on which *the arbitration agreements were concluded*: compare Article 16.3 of the LCIA Rules 1998 (which provided that *"The law applicable to the arbitration (if any) shall be the arbitration law of the seat of arbitration, unless and to the extent that the parties have expressly agreed in writing on the application of another arbitration law and such agreement is not prohibited by the law of the arbitral seat."*) with the LCIA Rules 1985 (which contained no such rule), noting the Preamble of the 1985 and 1998 Rules which provided, in the usual way, that *"Where any agreement. submission or reference provides arbitration under the Rules of the London Court of International Arbitration1 (the LCIA), the parties shall be taken to have agreed that the arbitration shall be conducted in accordance with the following Rules, or such amended Rules as the Court may have adopted to take effect **before the commencement of the arbitration**"* (emphasis added).

18. By contrast, the emergency arbitrator provisions introduced by the LCIA in 2014 were not made applicable to arbitration agreements concluded before the date of the new version of the LCIA Rules because they were deemed to be too significant of a change: see Article 9.14 of the LCIA Rules 2014 which provided, in derogation from the usual rule in the Preamble just noted that *"Article 9B [the new provision on emergency arbitrators] shall not apply if either: (i) the parties have concluded **their arbitration agreement before 1 October 2014** and the parties have not agreed*

[3] See e.g. *Enka* at para. 80.

in writing to 'opt in' to Article 9B; or (ii) the parties have agreed in writing at any time to 'opt out' of Article 9B."

19. On that evidence of market practice (also noting the respective dates of the change, 1998 for applicable law and 2014 for emergency arbitrators), there might be an argument for making clause 8 of the Bill (which introduces the concept of emergency arbitrators into the English legislative framework for the first time) applicable only to arbitration agreements concluded after the date of entry into force of the 2023 Act; but certainly not Clause 1. We do not believe that either should depart from the usual rule.

20. We further note in that respect that Lord Mustill, in *The Boucraa* [1994] 1 AC 486, expressed some doubts as to whether the categorisation of legislative changes as "substantive" or "procedural" to assess the extent to which retrospectivity would be acceptable was of limited assistance in this area of the law,[4] stating in particular that:

> … such a discussion would be unprofitable, partly because the distinction just mentioned may be misleading, since it leaves out of the account the fact that some procedural rights are more valuable than some substantive rights, and partly because I doubt whether it is possible to assign rights such as the present unequivocally to one category rather than another.

21. Thus, this would provide no basis for distinguishing the change in clause 1 (as "substantive") from those in the other clauses of the Bill (as "procedural") – even if that were a correct categorisation.

(4) Following the precedent of the 1996 Act (and of the arbitration legislation preceding it) and applying the rule on applicable law to arbitrations commenced after the date of entry into force of the 2023 Act is further justified by the current state of the law

22. In addition, there can be no basis for departing from the precedent of the 1996 Act (and of the arbitration legislations preceding it) given that the question of which law governs the arbitration agreement has never been a settled one in English law and has not been made any more predictable by the Supreme Court's decision in *Enka*.

23. In *The Boucraa* (supra), Lord Mustill cited with approval the following words of Staughton LJ in *Secretary of State for Social Security v. Tunnicliffe* [1991] 2 All ER 712, 724:

> In my judgment the true principle is that Parliament is presumed not to have intended to alter the law applicable to past events and transactions in a manner which is unfair to those concerned in them, unless a contrary intention appears. It is not simply a question of classifying an enactment as retrospective or not retrospective. Rather it may well be a matter of degree - the greater the unfairness, the more it is to be expected that Parliament will make it clear if that is intended.

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4 [1994] 1 AC 486 at 527G to 528C

24. With regard to the legislative change being made by clause 1 of the Bill, in the words of the Commission itself: [5]

> [c]onsultees said that the law in *Enka v Chubb* is complex and unpredictable. We note that the Supreme Court itself was divided both on the law and how to apply the law to the facts of the case before it. The current law risks being an opportunity for satellite argument, which in turn is productive of unnecessary cost and delay.

25. The legislative change being made is thus not taking away any clear or vested rights. It is introducing clarity where there was none. There is no basis for treating it any differently from the other legislative changes being made, and from the numerous other legislative changes made in this field over the past century.

(5) Prospective application by reference to the date of conclusion of future arbitration agreements (as opposed to the date of commencement of future arbitral proceedings) would defeat the very purpose of the change, and the strong policy reasons in favour of it

26. In its Second Consultation Paper, and in its Final Report, the Commission has accepted the strong policy reasons in favour of the legislative change proposed. Para. 1.138 to 1.145 of the Summary of the Final Report thus state as follows (emphasis added):

> 1.138 **Consultees said that the law in *Enka v Chubb* is complex and unpredictable.** We note that the Supreme Court itself was divided both on the law and how to apply the law to the facts of the case before it. **The current law risks being an opportunity for satellite argument, which in turn is productive of unnecessary cost and delay.**
> 1.139 We think that the effect of *Enka v Chubb* would be that many arbitration agreements would be governed by foreign law. This is because arbitration agreements do not always specify a governing law, but matrix contracts do often specify a foreign governing law.
> 1.140 The law of England and Wales is supportive of arbitration. Foreign law might not be as supportive, particularly on questions of: arbitrability (whether this dispute can be resolved through arbitration); scope (whether this dispute falls within the arbitration agreement); and separability (whether the arbitration clause survives any invalidity of the matrix contract, enabling arbitration to resolve disputes about such invalidity). **There is a risk that foreign law rules on these issues might preclude the arbitration from happening at all. We think that an express choice of arbitration should not be negated by the workings of an implied choice of foreign governing law.**
> 1.141 Further, if a foreign law governs the arbitration agreement, then, by virtue of section 4(5) of the Arbitration Act 1996, this will disapply the

[5] Final Report Summary at para. 1.138.

non-mandatory provisions of the Act. At least, it will disapply the non-mandatory provisions which are concerned with substantive matters – but not those concerned with procedural matters. Classifying statutory provisions as either substantive or procedural can produce some extra complexity and cost.

1.142 We recommend that a new rule be added to the Arbitration Act 1996 to provide that the law which governs the arbitration agreement is:

(1) the law that the parties expressly agree applies to the arbitration agreement; or

(2) where no such agreement is made, the law of the seat of the arbitration in question.

Agreement between the parties that a particular law applies to the matrix contract does not constitute express agreement that that law also applies to the arbitration agreement. This approach is supported by the majority of consultees. Our principal reasons are as follows.

1.143 **A default rule in favour of the law of the seat would have the virtues of simplicity and certainty. It would see more arbitration agreements governed by the law of England and Wales, when those arbitrations are also seated here. This would ensure the applicability of the doctrine of separability, along with its practical utility. It would give effect to the more generous rules on arbitrability and scope which our courts have seen fit to develop. It would remove a layer of uncertainty surrounding the effects of section 4(5).**

1.144 **A new default rule would preserve party autonomy in the choice to arbitrate, without that express choice being undermined by an implied choice of foreign governing law with potentially less generous provisions on arbitrability, scope, and separability. It would avoid satellite arguments about the position taken by a foreign arbitration law on arbitrability, scope, and separability, and any need to overcome deficiencies by applying a validation principle of uncertain scope.** It would also preserve party autonomy in the ability of the parties to override the default rule by making an express choice of law to govern the arbitration agreement.

1.145 Under our recommendation, the new rule would apply whether the arbitration was seated in England and Wales, or elsewhere. It would apply whether the seat was chosen by the parties, or otherwise designated. In this way, it could provide certainty across a range of circumstances.

27. We respectfully agree with all of the above. Given these very strong policy reasons for the proposed change, there can be absolutely no basis for keeping the old law for all existing arbitration agreements (of which there will hundreds of thousands). The vast majority of cases that will be coming before the courts for the next decade will be based on pre-legislation arbitration agreements, and a great many after that as well. Further, it cannot be desirable to allow two different regimes to co-exist for such a long and indefinite period of time: on one hand the overly complicated regime set out in *Enka*, with all the potential problems it raises in relation to satellite litigation; and on the other the simplified regime of the new default rule.

28. We note that these were the very reasons put forward by the DAC for the transitional provisions contained in section 84 of the 1996 Act.

(6) The Bill requires an overall transitional provision similar to section 84 of the 1996 Act to avoid the risk of legal challenge

29. The Bill should instead use the same transitional provisions as the 1996 Act which, in introducing changes of much wider purport, made them applicable to all arbitral proceedings commenced on or after the date on which the 1996 Act came into force.

30. We note in that respect that the Bill requires such a provision **for all the legislative changes being made**, in order to avoid arguments being raised – and possible litigation – over the application of other changes in the Bill, as happened in *The Boucraa* (supra) in relation to the change introduced by the Courts and Legal Services Act 1990 to the Arbitration Act 1950 (which had introduced a new section 13A, giving a power for arbitrators to dismiss claims for want of prosecution).

31. As the Bill stands, the only legislative change with a clear, albeit wrong, transitional provision is the change to applicable law in clause 1. While the Bill does have a clause entitled "Commencement and transitional provision" (clause 17), that clause says nothing as to whether those changes are to have prospective or retrospective effect. Some of these changes are far reaching, and controversial, such as – for instance – the introduction of a summary judgment procedure in clause 7.

32. In *The Boucraa*, the owners of a vessel referred a claim against the charterers to arbitration. The arbitrator, on an application by the charterers to dismiss the claim for want of prosecution under the Arbitration Act 1950 section13A, which had been inserted into the 1950 Act by the Courts and Legal Services Act 1990 section102, found the owners guilty of inordinate and inexcusable delay before, but not after, the coming into force of the 1990 Act. He concluded that section13A applied retrospectively and dismissed the claim. On the owners' appeal, the arbitrator's award was set aside by Saville J, it being held that in the absence of express statutory terms the presumption against retrospectivity applied so as not to deprive owners of their existing right to pursue the claim. The charterers' appeal was dismissed by a majority of the Court of Appeal ([1993] 3 W.L.R. 266). The charterers appealed again. The House of Lords ([1994] 1 AC 486) held, allowing the appeal, that (1) the basis of the rule regarding retrospectivity was fairness and it was a question in each case of considering whether the consequences of reading the statute with the suggested degree of retrospectivity were so unfair that Parliament could not have intended its words to be so construed; (2) the words of section 13A of the 1950 Act as inserted by section 102 of the 1990 Act indicated that the delay referred to included all delay that had caused the substantial risk that it was not possible to have a fair resolution of the issues in the claim; (3) the words used were sufficiently clear to indicate that Parliament was prepared to tolerate the degree of hardship involved in giving the legislation a partially retrospective effect;

and (4) accordingly, the arbitrator had been entitled to take into account all the delay and dismiss the owners' claim.

33. If a clear general transitional provision is not introduced, all of the Commission's proposed changes are at risk of similar challenges in Court. In particular, the analogy between a summary judgment procedure imported from Court practice and a procedure for dismissal for want of prosecution also imported from Court practice are obvious. While one would expect that the outcome would be similar to that in the *Boucraa*, there is no reason at all for leaving such avenues of challenge open, and every reason for having a clear rule as to when the new legislative provisions will apply. As is clear from longstanding legislative practice (supra), that rule should be that the new provisions will apply to all arbitrations commenced after the date of enactment.

(7) The sole basis for prospective application on the basis of the date of conclusion of new arbitration agreements referred to in the Final report does not withstand scrutiny

34. As noted above, the sole basis for prospective application on the basis of the date of conclusion of new arbitration agreements is a point recorded to have been made by "some consultees" in paragraph 12.26 of the Final Report, as follows:

> "Some consultees suggested that any reform which departs from Enka v Chubb should apply only to arbitration agreements entered into after the reform takes effect, in case parties had organised their existing affairs by reference to Enka v Chubb."

35. This does not withstand scrutiny. In particular:

(a) It is unclear what *"organised their existing affairs by reference to Enka v Chubb"* means. As noted in the discussion of point 4 above (and as recognised by the Commission), *Enka* has introduced no clarity to this area of the law.

(b) Yet further, only sophisticated parties take into account the law applicable to their arbitration agreement when they enter into contracts (as opposed to the law applicable to the matrix contract terms). It is unrealistic to suggest otherwise. If the parties are sufficiently sophisticated to do so, they would most likely expressly agree the law applicable to their arbitration agreement, rather than count on the fact that the application of *Enka* will ensure that the law applicable to the matrix contract will be applicable to the arbitration agreement. Any express choice of law would not be disturbed by the proposal in clause 1 of the Bill, which gives effect to such a choice (emphasis added):

> (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 arbitration in question.

(c) Even assuming that instances exist where the parties relied on the application of *Enka* to their arbitration agreement when drafting their contracts, the number of such instances would be negligible:

(i) As explained above, only sophisticated parties would be concerned with the law applicable to their arbitration agreement.

(ii) If the parties are so concerned, they are likely to have expressly agreed the law applicable to their arbitration agreement.

(iii) In fact, the most likely candidate for a "sophisticated party" that could try to rely upon *Enka* to "organise its affairs" and not specify a governing law in the arbitration agreement would be the type of party that wants to keep open the option of arguing that the arbitration agreement is invalid in some way under an non-arbitration friendly law – which is precisely the mischief that the legislative change is designed to avoid.

(d) *Enka* was handed down on 9 October 2020, that is to say less than 3 years ago. This means that the very limited number of parties which purportedly relied on *Enka* to *"organise their affairs"* would have done so for less than 3 years.

36. None of this, with respect, remotely outweighs the strong policy benefits recognised by the Commission (see point 5 above), or would justify departing from the usual rule in arbitration legislation that the legislative changes apply to *arbitrations* commenced after the date of enactment (not to *arbitration agreements* concluded after that date).

(8) Should the new section 6A be made mandatory?

37. There is a separate point which we invite the Commission to consider; that is as to whether the new section 6A should be made mandatory, in the same way as the new section 23A: see clause 2(3) of the Bill.

38. This would be so as to avoid any lingering argument that the new section 6A, being non-mandatory, could be displaced by a contrary choice of substantive law for the contract through the application of section 4(5): see *Enka* at para. 88 and ff.

39. We have formed no concluded view on this given the urgency with which we are writing to the Commission, but would tend to think that one should take that step (i.e. make section 6A mandatory) to be on the safe side.

Conclusion

40. For those reasons, we respectfully invite the Commission:

(a) To alter clause 1(2) of the Bill by deleting the proposed new section 6A(3);

(b) To alter clause 17 of the Bill by introducing a transitional provision identical to that contained in sections 84(1) and (2) of the 1996 Act; and

(c) To consider altering clause 1 of the Bill to introduce a provision analogous to clause 2(3) of the Bill in relation to clause 1, viz. a new clause 1(3) which would read as follows: "In Schedule 1 (mandatory provisions), before the entry for sections 9 to 11, insert— "section 6A (law applicable to arbitration agreement);".

LORD HOFFMANN

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20 September 2023

26 September 2023