

**ANNUAL COMMERCIAL CONFERENCE 2022**

***The Arbitration Act 1996: no kind of fault or***

***flaw?***

***Three problems on jurisdiction and the applicable law of the***

***arbitration***

with the participation of the Law Commission of England and Wales

*Thursday 13 October 2022
Royal Society of Arts*

*8 John Adam Street London WC2N 6EZ*

  **THE ARBITRATION ACT 1996: NO KIND OF FAULT OR FLAW?**

On 30 November 2021 the Law Commission of England and Wales announced a review of the Arbitration Act 1996. Its consultation paper was published on 22 September 2022. The premise of the reform exercise is that the legislation is generally sound, and that any changes made will be for the limited purpose of bringing it in line with present practice. While this does appear to be a good starting point, there exist deeper issues relating to jurisdiction and applicable law, which call for reform if London is to maintain its place as a preeminent seat for international arbitration. This conference will explore these issues from an English and comparative law perspective.

12:00: Registration and sandwich lunch

12:30: Opening remarks by Vernon Flynn KC, Brick Court Chambers

 Opening remarks by Sir Nicholas Green, Chairman of the Law Commission

12:45: **Session one**

One of the reform proposals under consideration is the extent to which section 67 ought to be reformed to prevent a *de novo* review of issues of the arbitral tribunal’s jurisdiction by the Courts. This panel will consider the extent to which this proposal is sound by reference to the judgments of the Supreme Court in *Dallah v Pakistan* [2010] UKSC 46, to the nature of the rule of *competence-competence*, and to the comparative law position in (*inter alia*) the United States and Singapore.

 Introduction of the panel by the chair, Sir Christopher Clarke, Brick Court Chambers

 Introduction of the topic by Allan Cerim, Brick Court Chambers

 **Panellists**

 Hilary Heilbron KC, Brick Court Chambers

 Justice Judith Prakash, Justice of the Court of Appeal, Supreme Court, Singapore

Professor George Bermann, Professor, Colombia Law School, Director of Center for International Commercial and Investment Arbitration

13.50: **Session two**

The jurisdiction of an arbitral tribunal seated in England and Wales can currently be challenged through no less than four procedural avenues: under section 9 (where a stay of Court proceedings is sought in favour of the arbitral proceedings); under section 32 (which currently requires the agreement of the parties or the permission of the tribunal); under section 67 (challenge of an award on jurisdictional grounds); and under section 72 (which gives a party objecting to jurisdiction the right to ignore the arbitral proceedings and take the issue directly to court). In addition, the existing case law under section 9 (summarised in *Joint Stock Company Aeroflot Airlines v Beresovsky* [2013] 2 Lloyd’s Rep 242 at [72]-[80]) means that there is no clear rule of priority between the tribunal and the court on applications under section 9 (with the issue of priority having to be considered on a case management basis in each challenge). This panel will consider whether there needs to be a rationalisation of sections 9, 32, 67 and 72.

Introduction of the panel by the chair, Lord Phillips, Brick Court Chambers

Introduction of the topic by Jessie Ingle, Brick Court Chambers

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**Panellists**

 Sir Richard Aikens, Brick Court Chambers

 Anne-Véronique Schlaepfer, Partner, White & Case (Geneva)

 Professor Pierre Mayer, Professor of Law; Partner, Mayer Greenberg Avocats (Paris)

 14:50: Tea

 15:15: **Session three**

In its decision of 9 October 2020 in *Enka v Chubb* [2020] UKSC 38, the Supreme Court decided *inter alia* that applying English conflict of laws rules, where the Parties to a contract containing an arbitration agreement have made an express choice of law to govern their contract generally, that choice will ordinarily apply also to the arbitration agreement. One consequence of that decision is that, in every London-seated arbitration with a choice of a foreign law (i.e. in a great many international cases seated in London), the question of whether or not the arbitration agreement is separable, and what effects will flow from that separable nature (if any), will now turn not on English law but on the foreign law chosen to govern the main contract. Thus instead of being able to rely on the clear principles set out in section 7 of the Arbitration Act and on the House of Lords’ pro-arbitration decision in *Fiona Trust v Privalov* [2007] UKHL 40, the parties (i) will need to ascertain (usually by means of expert evidence) the content of the foreign law as to separability; and (ii) what the consequences might be. The Supreme Court’s interpretation of section 4(5) of the Act in *Enka v Chubb* has also introduced a need to consider for every non-mandatory section of the Act (which include sections 30 [competence-competence], section 46 [substantive law to be applied by the Tribunal], section 48 [remedies], section 49 [interest] and section 58 [binding effect of awards]) whether the relevant section falls to be characterised as ‘procedural’ (in which case the relevant section will apply as the *lex arbitri*) or substantive (in which case it will be supplanted by the relevant rule of the *lex contractus*). This panel will consider the extent to which, irrespective of the soundness of the Supreme Court’s analysis as a matter of conflict of laws, these are problems which ought to be addressed as a matter of policy, for instance by means of a default rule providing for the application of the law of the seat to the arbitration agreement in the absence of choice.

Introduction of the panel by the chair, Lord Hoffmann, Brick Court Chambers Introduction of the topic by Andris Rudzitis, Brick Court Chambers

 **Panellists**

 Salim Moollan KC, Brick Court Chambers

 Professor Christophe Seraglini, Professor of Law; Partner, Freshfields (Paris)

 Dr Michele Potestà, Partner, Lévy Kaufmann-Kohler (Geneva)

 16:20: **General session**

Reports from each panel by Kyle Lawson, Zahra Al-Rikabi and Emilie Gonin, Brick Court Chambers – and discussion

Closing remarks by Professor Sarah Green, Law Commission

Closing remarks by Mark Howard KC, Joint Head of Brick Court Chambers

 17:00: Close and drinks

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#  SPEAKER PROFILES

**Hilary Heilbron KC**

Hilary now focuses on international arbitration sitting as an international arbitrator in major cases all over the world both under the main arbitral institutions and *ad hoc* with in excess of 125 appointments, and bringing to bear her earlier wealth of experience of major commercial and arbitral disputes as counsel under many foreign laws, such as appearing in the UK Supreme Court in *Dallah Real Estate Tourism Holding Co v Government of Pakistan*. She has recently been a member of various international task forces on current topics in international arbitration including on damages in arbitration and data protection in arbitration, both recently launched at ICCA in Edinburgh, and is a former member of the LCIA Court and the ICC UK Arbitration and ADR Committee.

**Vernon Flynn KC**

Vernon has a global and diverse practice in “big ticket” multi-jurisdictional disputes. His cases have ranged from substantial trial and appellate advocacy to injunctive or other interim relief before a very wide range of tribunals and jurisdictions. They have involved appearances in many jurisdictions such as Anguilla, Australia, Cayman Islands, Gibraltar, India, Hong Kong, Qatar, Seychelles, Singapore, St Lucia, Sweden, Tanzania, the Virgin Islands, and the United Arab Emirates.

**Salim Moollan KC**

Salim specialises in international commercial and investment arbitration. He has acted as counsel in high profile investment arbitration cases and currently acts as lead counsel in a number of prominent investment arbitrations for both States and investors. In the commercial field, he acts in high-value cases in (in particular) the energy and telecoms fields. He frequently sits as arbitrator (party-appointed and chair) in investment and commercial arbitrations. He has an in-depth knowledge of the procedural regimes of all major international arbitral institutions, being a past chairman and vice-chairman of UNCITRAL, a past Vice-President of the ICC Court, a past member of the LCIA Court, a member of the World Bank’s ICSID Panel of Arbitrators and having worked closely with these and other institutions in the establishment of an African platform for international arbitration in Mauritius.

**Lord Phillips of Worth Matravers**

Lord Phillips is a retired Law Lord and past President of the Supreme Court of England and Wales. During his time at the Bar of England and Wales he specialised in Commercial Law and Admiralty Law.  He was appointed a Judge of the Queen's Bench Division, where he sat in the Commercial Court.  In 1999 he was elevated to the Court of Appeal, appointed Master of the Rolls in 2000 and Lord Chief Justice in 2005.  Lord Phillips was appointed as Senior Law Lord in 2008 and oversaw the transition of the House of Lords to the Supreme Court in 2009, when he became the Court's first President. During his time in judicial office he presided over some of the most celebrated legal cases, including the complex prosecutions relating to the Maxwell Pension Funds, and also of Barlow Clowes.

**Lord Hoffmann of Chedworth**

Lord Hoffmann was a Lord of Appeal in Ordinary from 1995 to 2009. Since then he has been appointed as an arbitrator in more than 100 international commercial and investment treaty disputes under the ICC, LCIA, ICSID, UNCITRAL, SIAC and KLRCA Arbitration Rules. His judgments in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 898 and *Chartbrook v Persimmon Homes Ltd* [2009] AC 1101 are the leading general authorities in England and the Commonwealth on the interpretation of agreements.

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**Sir Christopher Clarke**

Sir Christopher was formerly Head of Brick Court Chambers (1990-2004). He is a former judge of the courts of appeal of Jersey and Guernsey; the Commercial Court and the Court of Appeal of England and Wales and of the Court for Ecclesiastical Causes Reserved. He is currently President of the Court of Appeal of Bermuda and an international commercial arbitrator.

**Sir Richard Aikens**

Sir Richard practised in Brick Court Chambers from 1974 to 1999, specialising in shipping, insurance and re-insurance, banking, international trade and arbitration and, after being appointed QC in 1986, also in energy, telecommunications and professional negligence. He was appointed to the High Court in 1999 and the Court of Appeal in 2008. Since retiring in 2015 he has been appointed arbitrator in many international commercial arbitrations under ICC, LCIA, LMAA and SIAC Rules as well as *ad hoc* appointments. He has also dealt with investment treaty disputes. He is one of the authors of *Bills of Lading*, is an editor of *Dicey, Morris & Collins on the Conflict of Laws* and is a Visiting Professor at King’s College, London and at Queen Mary University of London.

**Kyle Lawson**

Kyle’s practice covers all aspects of commercial litigation and international commercial arbitration. He has acted in numerous international arbitrations under a wide variety of institutional rules (including LCIA, ICC, LMAA, DIFC, UNCITRAL and the Swiss Rules of International Arbitration), as well as in ad hoc proceedings. In addition, Kyle is frequently instructed to act in court proceedings arising out of arbitrations (whether seated in England or elsewhere), including applications for interim relief under s.44 (e.g. injunctive relief), seeking or resisting the enforcement of foreign or domestic awards under s.66 or the New York Convention, and challenging or defending arbitration awards under ss. 67, 68 and 69.  He was previously a contributing authority to *SIAC Rules: An Annotation*, an annotated guide to the arbitration rules of the Singapore International Arbitration Centre.

**Zahra Al-Rikabi**

Zahra is recognised as a leading junior for public international law, international arbitration, administrative law and EU law (Legal 500, 2023), and is a member of the Attorney General’s C Panel for public international law. She was shortlisted in the Legal 500 Bar Awards 2022 for international arbitration junior of the year, and selected in *The Lawyer* Hot 100 in 2020. As a native Arabic speaker, Zahra is developing a mediation practice with a focus on commercial disputes involving Arabic speaking lay clients

**Emilie Gonin**

Emilie specialises in international commercial arbitration, commercial litigation and investment treaty arbitration. She also has significant expertise in public international law and human rights law. She has represented parties in more than thirty arbitrations conducted under all major arbitration rules (ICSID, SCC, UNCITRAL, ICC, LCIA, HKIAC, LMAA). She has considerable expertise in investment treaty arbitration. Her notable recent instructions include three ICSID cases in the real estate (*Alverley Investments Ltd, Germen Properties Ltd v Romania*, ICSID Case No. ARB/18/30; *Dalal v United Arab Emirates*, ICSID Case No. ARB/19/10) and banking sectors (*Jochem Bernard Buse v Republic of Panama*, ICSID Case No. ARB/17/12).

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**Allan Cerim**

Allan has been instructed in a number of commercial and investor-state arbitrations, as well as s.67, 68 and 69 challenges. Unusually for a junior of his level of call, he cross-examined witnesses over the course of three days in a high-value fraud case before an eminent ICSID Tribunal. He also has experience of cases under the Energy Charter and has also assisted on cases involving the Court of Arbitration for Sport. He also has a busy general domestic and offshore commercial practice, having recently acted in two big trials, one in England and the other in the Cayman Islands. His advisory work focuses on the Middle East – Allan is a fluent and native Arabic speaker.

**Jessie Ingle**

Jessie is developing a broad practice covering all aspects of Commercial, Public and International/EU law. She has experience and a particular interest in investment treaty arbitration, international human rights law, civil fraud, sanctions and cryptocurrency matters. Before coming to the Bar, Jessie qualified as a solicitor at Linklaters LLP and practised as an associate in the firm’s dispute resolution department in London, specialising in commercial litigation and public law.

**Andris Rudzitis**

Andris is developing a broad practice covering all aspects of Commercial, Public and International/EU law. He has experience and a particular interest in international arbitration and civil fraud. Recently, his arbitration practice has included an HKIAC arbitration and proceedings seeking recognition and enforcement in the English courts of an award made pursuant to the ICSID Convention. Before commencing pupillage, Andris worked as the judicial assistant to Lord Justice Patten in the Court of Appeal.

**Sir Nicholas Green**

Sir Nicholas was head of Brick Court Chambers from 2012-13. At the Bar he specialized in EU law, constitutional and public law, competition and economic regulatory law, and general civil and commercial law. He was chair of the Bar Council in 2010. He was appointed Chair of the Advocacy Training Council in 2011. He was appointed to the High Court in October 2013 (Queen’s Bench Division, now King’s Bench Division) and was made a Presiding Judge on the South Eastern Circuit in 2016. He was appointed Chair of the Law Commission in August 2018 and a lord Justice of Appeal in 2018.

**Professor Sarah Green**

Sarah was appointed as Law commissioner for commercial and common law in 2020. She was previously Professor of Private Law at the University of Bristol. Prior to that, she was Professor of the Law of Obligations at the University of Oxford, and, before that, a lecturer at the University of Birmingham from 2001-10. She has written about a variety of issues including virtual currencies, blockchain issues surrounding intermediated securities, smart contracts, sale of goods law as applicable to digitised assets and wage theft.

**Mrs Justice Judith Prakash**

In 2016 Justice Prakash was the first woman to be appointed a permanent judge of the Singapore Court of Appeal. She graduated from the University of Singapore and was admitted as an advocate and solicitor in Singapore and was in private practice until 1992. Starting as a shipping lawyer, she subsequently practised banking and finance, and company law. She joined the Supreme Court of Singapore as Judicial Commissioner in 1992 and became a High Court Judge in 1995. She has sat on many cases involving arbitration issues, both at first instance and on appeal, and is one of the Supreme Court’s specialist arbitration judges.

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**Professor George Bermann**

George is a world-renowned authority on comparative law, EU law, international trade contracts, WTO dispute resolution, and transnational litigation and arbitration. For more than four decades, he has been an active international arbitrator in commercial and investment disputes in all sectors, including general commercial contract, construction, intellectual property, energy, oil and gas, competition law, insurance, telecommunications, pharmaceuticals, distributorship and franchising, transportation, and employment. He also serves regularly as an expert witness before international arbitral tribunals as well as before courts in arbitral-related cases.

**Anne-Véronique Schlaepfer**

Anne-Véronique is a partner in White & Case’s international arbitration practice and is also the executive partner of the firm's Geneva office, She has acted as counsel in more than 150 arbitration proceedings involving, amongst others, construction contracts, pharmaceuticals, energy (upstream and downstream), joint venture agreements, sales contracts, collateral management agreements, and know-how license agreements. She has also served as arbitrator in more than 30 cases and represents parties before Swiss courts in arbitration-related court proceedings, in particular in challenges to arbitral awards.

**Professor Pierre Mayer**

Pierre has acted as counsel or arbitrator in hundreds of proceedings, in commercial and investment matters. His experience spans a variety of sectors and all forms of contracts. He is the author of the reference textbook on French international private law and of a general course at The Hague Academy of International Law. He is a founding partner of the firm Mayer Greenberg, where he focuses on his practice as arbitrator. Pierre is a specialist in international arbitration law and private international law, two subjects which he has taught for decades at the University of Paris 1 (Panthéon-Sorbonne) where he was a professor from 1984 to 2012 and has been an emeritus professor since 2012.

**Professor Christophe Seraglini**

Avocat à la Cour and partner at Freshfields Bruckhaus Deringer in the international arbitration group, Christophe has particular experience in energy, engineering & construction, environment, high technology sectors of industry, Sale of goods, Joint-venture, Industrial Cooperation and post-M & A. He has also considerable experience in handling international investment disputes both in the role of Counsel and Arbitrator, brought under the auspices of the ICC, ICSID and in international ad hoc arbitration proceedings. In parallel, Christophe is a Professor of Law at the University Paris Sud – Paris Saclay where he teaches international arbitration, private international law, international contracts law and international business transactions.

**Dr Michele Potestà**

Michele specialises in international commercial and investment arbitration, as well as public international law. Over the past ten years, Michele has participated in over 35 international investment and commercial arbitrations as counsel, arbitrator and secretary of the tribunal, under all major arbitral rules (ICC, ICSID, UNCITRAL, SCAI, CAM, DIAC, Danish Institute of Arbitration, and others), and in different jurisdictions. Michele has advised sovereign states on their investment treaty programs and currently acts as expert advisor to the Swiss Government in the inter-State negotiations on the reform of investor-state dispute settlement (“ISDS”) in UNCITRAL’s Working Group III.

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# CHAMBERS PROFILE

Brick Court Chambers is one of the leading sets of barristers’ chambers in the UK, having a strong reputation for Commercial, Competition, Public and International/EU law. In addition to providing specialist expertise in each of those areas of law, chambers is uniquely placed to handle cases involving more than one field. We have over 100 members, including 47 KCs, who practise full-time. We also have links in many common law jurisdictions through distinguished door tenants and academics. Members of chambers are independent and self-employed, having a wide diversity of skills and practices. The Brick Court ethos is always to provide a service of the very highest quality. We pride ourselves not only on excellence in advocacy and advisory work but on being accessible, user friendly and team players.

Brick Court was founded by William Jowitt, later Lord Chancellor, when he took rooms in 1 Brick Court in 1921. Chambers' rise to prominence was notable in the 1970s as shipping and international trade litigation increased exponentially. Notable members of chambers included Robert Alexander QC (later Lord Alexander of Weedon) and Nicholas Phillips QC (later Lord Phillips of Worth Matravers KG, the first President of the Supreme Court) who were widely regarded as among the most consummate and able lawyers of that period. Under the watchful eye of the renowned senior clerk, (Ronald) Burley, Brick Court became one of the leading commercial chambers in London. Burley became senior clerk at the age of 25 after WW2, a position he held for more than 40 years, and chambers owes as much to him for its meteoric rise as to its stellar members.

Rather than limit practice only to these areas, members of chambers' advocacy skills were also turned to defamation, media, sports and tax as well as to disputes between some of the most colourful businessmen of the day, Robert Maxwell and Tiny Rowland.

The 1980s and 1990s saw City deregulation and the rise of EEC (now EU) Law, the consequences of which practitioners embraced. City disputes such as Lloyd's reconstruction and renewal, BCCI and British and Commonwealth were undertaken by Brick Court barristers. In EU Law members of chambers began to change the legal landscape with Factortame and the B&Q Sunday Trading litigation. Our combined expertise in EU, public/constitutional law and commercial law equips us particularly well to negotiate the legal issues thrown up by Brexit.

One of the factors in our continued pre-eminence is our ability to recruit the most able and talented lawyers of their generation. We have a rigorous and testing pupillage period to ensure that not only are we delivering excellent legal skills, but by individuals who excel in advocacy and are responsive to the needs of modern clients.

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 | * Robert Webb KC
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Our building, opposite the High Court in London is spacious, modern and allows conferences with clients to be conducted in comfortable surroundings.

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