EVIDENCE ON THE ARBITRATION BILL

(HOUSE OF LORDS' SPECIAL PUBLIC BILL COMMITTEE)

SUBMISSION BY LORD PHILLIPS, SIR RICHARD AIKENS, SIR CHRISTOPHER CLARKE, SALIM MOOLLAN KC AND EMILIE GONIN (BRICK COURT CHAMBERS), SIR BERNARD RIX (20 ESSSEX STREET) AND RICKY DIWAN KC (ESSEX COURT CHAMBERS)

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 eighteen 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.

2. In particular:

   (a) Sir Richard Aikens and Salim Moollan KC exchanged views with the Law Commission (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) The matter was addressed in detail, with the assistance of experts from France, the US, Singapore and Switzerland, at the Brick Court Commercial Conference (which was attended by the Law Commission) in October 2022.

   (d) A formal response to the Commission's First Consultation Paper (which had not retained the proposal made) was filed on 15 December 2022, reiterating the need for reform on this point.

(e) 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.

(f) A note regarding the issues raised by the transitional provisions included in Clause 1 of the Law Commission's Bill (which would have limited the reform on applicable law to arbitration agreements concluded after enactment of the Bill) was sent to the Law Commission on 26 September 2023 to point out the problems with that approach and recommending alignment with the transitional provisions of the Arbitration Act 1996. That recommendation was accepted.

3. Our work with the Law Commission in this area was kindly acknowledged by Lord Hope during the debates on 19 December 2023.[1] We accordingly write to submit our respectful views to the Committee regarding the question raised by (in particular) Lords Hoffmann and Mance (who also contributed to our submissions to the Law Commission on the point) and worded as follows in the call for evidence:

> *Is clause 1(2) of the Bill (adding new Section 6A to the Arbitration Act 1996) sufficiently clear in its drafting (see Hansard 19 December 2023 Grand Committee Col 429GC-430GC and 433GC to 434GC)?*

4. We then also respond briefly to the other specific questions posed in the Call for Evidence.

Is clause 1(2) of the Bill (adding new Section 6A to the Arbitration Act 1996) sufficiently clear in its drafting?

5. As will be seen from the above, our initial proposal to the Law Commission was that the new applicable law section should be worded along the following lines:

> *The law applicable to the arbitration agreement shall be that of the seat, save where the parties expressly stipulate otherwise <u>in the arbitration agreement itself</u>.*

6. The reason for the words underlined is that the (with respect, ultimately sterile) debate which the courts have been faced with for decades is whether (as a matter

[1] See *Hansard 19 December 2023 Grand Committee* Col 429GC to 430GC, noting as follows: "… a word should be said about the work done by some very experienced practitioners in Brick Court Chambers … They worked to persuade the Law Commission to include a provision in the Bill about the law applicable to the arbitration agreement. I understand that what is now Clause 1 was not in the first draft of the Bill, but it is good to see that the Law Commission was persuaded that there was a need to clarify the rules as to its determination."

of the English rules of conflict of laws) a choice of substantive law in the main contract should be considered as a choice of law for the arbitration agreement as well.

7. As we explained in our submissions to the Law Commission (which are with the Law Commission, but which we will also communicate to the email address provided,[2] in case they are of interest), the designation of the law applicable to the arbitration agreement is ultimately a policy choice, with a choice of the law of the seat (English law for London seated arbitrations) being required to preserve the key concepts developed by English law to protect English-seated arbitrations from attacks by recalcitrant respondents. Those key concepts include the principles of 'one stop adjudication', arbitrability and separability.

8. It was accordingly our view (and it remains our respectful view) that the rule giving effect to that policy choice must be clear so that the door is now firmly shut on the sterile debate that has so consumed the courts. Thus while the Parties would remain free to make a choice of law other than that of the seat, that would have to be in the arbitration agreement itself.

9. We respectfully agree with the views expressed by the noble Lords who participated in the debates on 19 December 2023 that there is real doubt as to whether the clause ultimately drafted by the Law Commission and/or Parliamentary Draftsman achieves this. That clause reads as follows:

> *"6A Law applicable to arbitration agreement*
>
> *(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.*
>
> *(2) For the purposes of subsection (1), agreement between the parties that a particular law applies to an agreement of which the arbitration agreement forms a part does not, of itself, constitute express agreement that that law also applies to the arbitration agreement."*

10. In our respectful submission that drafting is problematic in two respects:

    (a) For reasons which one can understand (i.e. a wish to show a respect for party autonomy), the rule (which is contained in clause 6A(1)) is first expressed as being one of party choice, and then supplemented by a subsidiary rule that the law of the seat will apply in the absence of choice. That begs the question of how that choice is to be made, and – in particular

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– whether it can be made simply by choosing the substantive law of the contract. In other words, it opens the door to, rather than closes it on, the unhelpful debate which this reform is looking to eradicate.

(b) That then gives rise to the need for clause 6A(2) which seeks to clarify that *"agreement between the parties that a particular law applies to an agreement of which the arbitration agreement forms a part does not, of itself, constitute express agreement that that law also applies to the arbitration agreement."*

11. Accordingly:

(a) We respectfully disagree that the solution floated by Lord Hoffmann, *viz. "quietly to drop new Section 6A(2)"*[3] will work. The wording chosen for the rule in clause 6A(1) unfortunately invites, and requires, the clarification set out in clause 6A(2) for the reasons set out above.

(b) We respectfully submit that the best way of giving effect to the policy choice in favour of clarity (and of protecting arbitrations held in England) which clause 6A gives effect to is to have a clause worded as set out in paragraph 5 above, i.e. ***"The law applicable to the arbitration agreement is the law of the seat of the arbitration in question, save where the parties have expressly provided otherwise in the arbitration agreement itself."*** In addition to having the very important benefit of clarity while preserving party autonomy, this would be a shorter clause, and there would be no need for Clause 6A(2).

(c) An alternative which preserves the current drafting would be to amend clause 6A(1) slightly as follows: "*(1) The law applicable to an arbitration agreement is— (a) the law that the parties expressly agree* ***in the arbitration agreement*** *applies to the arbitration agreement, or (b) where no such agreement is made, the law of the seat of the arbitration in question.*" (added words in bold). One could then also drop clause 6A(2).

(d) If that is felt to be too much of a change at this stage of the debates, then we respectfully agree with the comments made in the debates as to the entirely unhelpful nature of the words *'of itself'* in clause 6A(2), and as to the need for those words to be deleted.

Other specific questions posed in the Call for Evidence.

12. We now respond briefly to the other specific questions posed in the Call for Evidence, for the sake of completeness.

[3] See *Hansard 19 December 2023 Grand Committee* Col 433GC to 434GC.

13. **Q1. Whether you agree with the proposed reforms and whether the reforms achieve what they are intended to?**

Having been part of the Law Commission's processes from Day 1, we unreservedly do. Those reforms (and in particular that on applicable law) are central to preserving the leadership of England and Wales in the international arbitration field and to maintaining the standing of London as a safe and leading seat for international arbitration.

14. **Q2. Provisions in the Government's bill that differ from the version proposed by the Law Commission concerning:**

(a) **Changing the bill so that it now provides the changes to the law apply to all arbitration agreements whenever made except those where arbitrations have already commenced**

As noted above, we immediately wrote to the Law Commission noting the problems with the transitional provision initially proposed by the Commission and proposing the solution now adopted,[4] and accordingly agree wholeheartedly with this (absolutely essential) change.

(b) **Extending the extent of the bill to Northern Ireland**

We have no specific comment on that change.

15. **Q3. What impact the reforms are likely to have on the arbitration market in the United Kingdom/the City of London**

See our response to Q1 above.

16. **Q4. Is clause 1(2) of the Bill (adding new Section 6A to the Arbitration Act 1996) sufficiently clear in its drafting (*see Hansard 19 December 2023 Grand Committee Col 429GC-430GC and 433GC to 434GC*)?**

This is addressed in detail above.

[4] See our Note to the Law Commission on Recommendation 19 of its Final Report of 20 September 2023, and our Amended Note to the Law Commission on Recommendation 19 of its Final Report of 26 September 2023.

17. **Q5. Whether the amendment to section 67 of the Arbitration Act 1996 relating to challenges to substantive jurisdiction) set out a sufficiently clear approach?**

We respectfully share the views expressed by Lord Mance on that issue during the debates.[5] As expressed in our submissions to the Law Commission, we do not believe that there was a need for reform in that area in the first place: it is essential that the Courts remain the final and real judge of arbitral jurisdiction to avoid 'bootstrapping' (as His Lordship put it during the debates). We further agree with His Lordship that (i) the abandonment of the proposal to change the right of reconsideration by the Courts to a limited right of appeal together with (ii) consideration of the issue by the Rules Committee, is a satisfactory way out of a debate which – in our respectful view – had no *raison d'être* in the first place. We do not for our part think there is any need for specific Rules of Court to deal with this question but that will be matter for the Rules Committee (and for another day).

Respectfully submitted.

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[5] See *Hansard 19 December 2023 Grand Committee* Col 434GC to 435GC.