Written Evidence submitted by Peter Ashford FCIArb

To the Special Public Bill Committee on the Arbitration Bill

1. Overall, I support the Bill and agree with the proposed reforms which, subject to my comments below, achieve what they are intended to. It is an excellent modernisation of the existing Act, which, in turn, has served us well. I applaud the work of the Law Commission.
2. There are, however, a few matters that I wish to commend for consideration.
3. I wholeheartedly agree with the removal of clause 1(2)(3) of the Law Commission draft Bill: retaining it would have involved different legal provisions applying dependent on when the arbitration agreement was made, and some agreements subsist for very many years e.g. under a lease. I do, however, commend consideration of Clause 17(4)(a) the draft Bill. This provides: "*Subject to any transitional or saving provision made under subsection (3), an amendment made by sections 1 to 14— (a) does not apply to— (a) arbitral proceedings commenced before the day on which the section making the amendment comes into force ("pre-commencement arbitral proceedings"),*". This mirrors, broadly, s84(1) of the 1996 Act: "*The provisions of this Part do not apply to arbitral proceedings commenced before the date on which this Part comes into force.*" But the 1996 Act continues to tell you what it **does** apply to, in s84(2): "*They apply to arbitral proceedings commenced on or after that date under an arbitration agreement whenever made*." Such a provision should be included in the Bill. The purpose of the Bill is to clarify, and, where appropriate, change, the law. Such an inclusion might be criticised as belt and braces, perhaps - but it is surely better to know what the Act does, rather than what it does not do.
4. I have no strong views on extending the proposed legislation to Northern Ireland: it seems sensible to do so but I do not have sufficient understanding of the local issues to give a definitive opinion.
5. I consider that the reforms are likely to have a positive impact on the arbitration market in the United Kingdom/the City of London. It is already perceived as an arbitration friendly and reasonably certain of outcome supervisory jurisdiction and everything that can be done to strengthen that, will improve the chance of 'London' being chosen as a seat and retaining the substantial volume of arbitrations that London enjoys.

6. My first main issue is over the drafting of clause 1(2). Again, it tells us what is not "*of itself*" sufficient: "…*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*." I again commend the logic of s84(2) of the 1996 Act and that consideration be given add a provision that says something to the effect that '*a choice of law in, specifically relating to, or referencing the arbitration agreement, is a sufficient express choice of law'*.
7. Such a provision might at least help the draftspersons of arbitration agreements in the future (although the simple expedient of stating another governing law - i.e. this agreement to arbitrate is governed by the laws of X - ought to have been standard drafting for many years now).
8. I also support the amendment to section 67 of the Arbitration Act 1996 relating to challenges to substantive jurisdiction. A complete re-hearing can be wasteful of resources and encourages gamesmanship (withholding evidence for a second attempt before a Court). Not all of the evidence needs to be re-heard if the party participated and had the opportunity to submit, and challenge, evidence. The bundles and transcript should suffice.
9. Finally, my second main issue is that I commend consideration of a small amendment to clause 23A to add to the end of clause 23A(3)(b) words to the effect of '… *having made reasonable enquiry*'. To permit it to remain as drafted is to beg the question of what an arbitrator "*ought reasonably to be aware*" of. If a statutory duty of enquiry is added to the statutory duty of disclosure it both makes sense and answers the question of what an arbitrator should 'reasonably be aware of'.
10. In *Locabail v Bayfield* [2000][1], the Court of Appeal acknowledged, indeed recommended, that solicitors "*conduct a*

[1] [2000] QB 451 at [20]: "*When members of the Bar are appointed to sit judicially, whether full-time or part-time, they may ordinarily be expected to know of any past or continuing professional or personal association which might impair or be thought to impair their judicial impartiality. They will know of their own affairs, and the independent, self-employed status of barristers practising in chambers will relieve them of any responsibility for, and (usually) any detailed knowledge of, the affairs of other members of the same chambers. The position of solicitors is somewhat different, for a solicitor who is a partner in a firm of solicitors is legally responsible for the professional acts of his partners and does as a partner owe a duty to clients of the firm for whom he or she personally may never have acted and of whose affairs he or she personally may know nothing. While it is vital to safeguard the integrity of court proceedings, it is also important to ensure that the rules are not applied in such a way as to inhibit the increasingly valuable contribution which solicitors are making to the discharge of judicial functions. Problems are, we apprehend, very much more likely to arise when a solicitor is sitting in a part-time capacity, and in civil rather than criminal proceedings. But we think that problems can usually be overcome if, before embarking on the trial of any assigned civil case, the solicitor (whether sitting as deputy district judge, assistant recorder, recorder or section 9 judge) conducts a careful conflict search within*

careful conflict search". Barristers are, apparently, "*expected to know of any past or continuing professional or personal association*" – so whilst the 'conflict search' might simply be asking themselves a question, it is a 'search' nevertheless. *Locabail* was a special sitting of the Court of Appeal comprising Lord Bingham CJ, Sir Richard Scott V-C and Lord Woolf MR hearing five applications for permission to appeal, listed and heard together since they raised common questions concerning disqualification of judges on grounds of bias.

The judgment was unanimous and plainly sought to clarify and bring certainty to the law. It deserves appropriate respect.

11. The Supreme Court in *Halliburton* having made a clear finding that there is a duty of disclosure, abdicated, I suggest, responsibility by leaving any duty of enquiry in vague terms. It is unfortunate that the Supreme Court did not take the further step of elevating a 'statement of good practice' relating to enquiry to a legal duty. I accept that strictly it was not necessary for the result (as there was no issue about enquiry) but the Court could have said more on an *obiter* basis.

12. The weight of precedent is plainly in favour of enquiry as a precursor to disclosure. Not only, is there *Locabail*, but ICSID cases such as *Vivendi v Argentina* [2]plainly recognise the duty of enquiry.

13. Likewise, the IBA Guidelines on Conflicts of Interest in International Arbitration, in General Standard 7(d),[3] plainly require "*reasonable enquiries*" by an arbitrator to identify any conflict (notably preceded by the parties' performing "*reasonable enquiries*" (General Standard 7(c)) to comply with a duty to inform the arbitrator of any relationship between the arbitrator and the party or any person with a direct economic interest in the award (General Standard 7(a)).

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the firm of which he is a partner. Such a search, however carefully conducted and however sophisticated the firm's internal systems, is unlikely to be omission-proof. While parties for and against whom the firm has acted, and parties closely associated, would (we hope) be identified, the possibility must exist that individuals involved in such parties, and parties more remotely associated, may not be identified. When in the course of a trial properly embarked upon some such association comes to light (as could equally happen with a barrister-judge), the association should be disclosed and addressed, bearing in mind the test laid down in Reg. v. Gough. The proper resolution of any such problem will, again, depend on the facts of the case."

[2] Annulment Decision 20 August 2007 available at https://www.italaw.com/sites/default/files/case-documents/ita0221.pdf. The case concerned an arbitrator who was a director of a bank. *"[222] ... any arbitrator [must]… specifically investigate whether the bank has any connection with or interest in any of the parties in its pending arbitrations but, if such an arbitrator decides in principle to continue, also to notify the parties in each arbitration of such a connection or interest. This imposes a continuous duty of investigation…. [226] having properly and adequately investigated and established any relationship between the bank and any of the parties to the arbitrations, it is for the arbitrator personally first to consider such a connection in terms of a voluntary resignation as arbitrator. Such connection must otherwise be properly disclosed to the parties …*"

[3] "*An arbitrator is under a duty to make reasonable enquiries to identify any conflict of interest, as well as any facts or circumstances that may reasonably give rise to doubts as to his or her impartiality or independence. Failure to disclose a conflict is not excused by lack of knowledge, if the arbitrator does not perform such reasonable enquiries*."

14. Leading commentators similarly endorse the duty to enquire e.g. Lew, Mistelis and Kroll in *Comparative International Commercial Arbitration*.[4]

15. In *Halliburton* itself it appears that there was no question of enquiry: it was accepted that the arbitrator knew that he had been appointed in the other arbitrations. He applied his mind to it at the time of those appointments and it did not occur to him that he was under any obligation to disclose.[5]

16. In *Newcastle United Football Company Limited v The Football Association Premier League Limited* [2021] it seems clear that the arbitrator knew some things, in the sense that he recalled some, but not all, details – a likely result in practice. *Premier League* had disclosed the fact that the arbitrator had advised it on a possible change to a section of its Rules in 2017 (that section was apparently not relevant to the pending dispute and the advice was more than 3 years prior to appointment). *Newcastle* had requested the arbitrator recuse himself. The arbitrator declined. *Newcastle* persisted and the arbitrator entered into *ex parte* communications with *Premier League's* solicitors stating that he had no recollection of the advice, could they provide a copy and consent to it being disclosed to *Newcastle.* This was described by the Judge as an *"error of judgment".*

17. This highlights that had the arbitrator properly enquired before disclosure, the problem ought not to have arisen. To sanction or endorse the lack of enquiry might not be going so far as to endorse Nelsonian blindness but nevertheless it leaves a very bad taste in the mouth. To deliberately not enquire would be dishonest, but mere negligent failure to search is neither dishonest nor sufficient to attribute knowledge and presumably most failures to search would
fall into this category.[6] However, as the arbitrator in *Halliburton* positively asserted that he *"did not think that the above circumstances put any obligation upon [him] to make any disclosure"*[7] he presumably applied his mind and had the case been

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[4] "***11-39*** *The duty to disclose also requires an arbitrator to make enquiries as to whether any relationships exist which have to be disclosed. He cannot just rely on his existing knowledge. The principle of reasonableness limits the extent of enquiries to be made by the arbitrator to find out potential conflicts and the resulting obligation to disclose those facts. Arbitrators cannot, for example, be expected to extend their conflict check to their former law firms and to provide the parties with a complete and unexpurgated business biography*." (footnotes omitted)

[5] The arbitrator in Halliburton (Mr Rokison) wrote: "*I do not think and did not think that the above circumstances put any obligation upon me to make any disclosure to you or your clients under the IBA Guidelines*." (emphasis added) - see Court of Appeal Judgment at [2018] EWCA Civ 817 at [18].

[6] See Lord Millett in *Twinsectra v Yardley* [2002] UKHL12 at [112]: "*It is dishonest for a man deliberately to shut his eyes to facts which he would prefer not to know. If he does so, he is taken to have actual knowledge of the facts to which he shut his eyes. Such knowledge has been described as "Nelsonian knowledge", meaning knowledge which is attributed to a person as a consequence of his "wilful blindness" or (as American lawyers describe it) "contrived ignorance". But a person's failure through negligence to make inquiry is insufficient to enable knowledge to be attributed to him: see Agip (Africa) Ltd v Jackson [1990] Ch 265, 293.*"

one where enquiry was relevant, the argument might have been made that Nelsonian blindness was present.

18. In Halliburton at [107] it is stated: "*An arbitrator can disclose only what he or she knows and is, as a generality, not required to search for facts or circumstances to disclose. But I do not rule out the possibility of circumstances occurring in which the arbitrator would be under a duty to make reasonable enquires in order to comply with the duty of disclosure*."

19. Parliament should seize the opportunity of codifying what many practitioners acknowledge as, at the very least, best practice – indeed an obligation. Carrying out a conflict check is now so prevalent that it should be codified into the law as the duty of enquiry.

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[7] See fn 5.