Written Evidence From Herbert Smith Freehills LLP

DRAFT ARBITRATION BILL

1. INTRODUCTION

1.1 Herbert Smith Freehills LLP welcomes the opportunity to submit a written submission on the proposed bill **(the Draft Bill)**.

2. GENERAL COMMENTS

2.1 The Committee's Call for Evidence asks (i) whether we agree with the proposed reforms and whether the reforms achieve what they are intended to, and (ii) what impact the reforms are likely to have on the arbitration market in the UK/City of London.

2.2 Consistent with our responses to the Law Commission's first and second consultation papers, we have agreed throughout the consultation process with the rationale behind the proposed reforms and what they are intended to achieve. We consider the proposed changes to be sensible and pragmatic, achieving the aim of fine-tuning the Arbitration Act 1996 (the **1996 Act**) whilst maintaining its legitimacy.

2.3 As is recognised in the explanatory notes to the Draft Bill, London is one of the most attractive jurisdictions for arbitration and derives a significant economic benefit from this pre-eminent position. The 1996 Act is widely recognised internationally as a leading piece of arbitration legislation, owing to its clarity and the careful balance that it strikes between upholding arbitration agreements but preserving the ability for the courts to intervene where necessary. The predictable and pro-arbitration stance of the English judiciary further enhances London's reputation as a safe arbitral seat.

2.4 However, the arbitration market is increasingly competitive. Since the 1996 Act was enacted, many other jurisdictions have recognised the benefits of being seen as a leading jurisdiction for arbitration. As a consequence, other countries have sought to introduce new or more modern arbitration legislation in order to gain or enhance recognition as a safe seat. London is therefore increasingly competing with many other jurisdictions as a choice of arbitral seat in international contracts.

2.5 Accordingly, it is important that the 1996 Act remain best in class to ensure that London continues to be the one of the world's leading centres for the resolution of disputes by arbitration. However, it is also equally important that the 1996 Act's existing reputation is maintained. As a consequence, any revisions must

be introduced carefully and changes should not be introduced simply for innovation's sake.

2.6 The Law Commission's proposals tread lightly on the existing legislation, giving appropriate recognition to its strength and reputation. The changes proposed in the Draft Bill have been reached following a period of very extensive consultation and careful, detailed explanation of proposed changes. As a consequence, we are confident that the Draft Bill only proposes changes that should further encourage parties to choose London-seated arbitration.

3. PROVISIONS IN THE GOVERNMENT'S BILL THAT DIFFER FROM THE DRAFT CIRCULATED BY THE LAW COMMISSION

Temporal application (s17(4) of the Draft Bill)

3.1 The Draft Bill proposes that, once in force, it will apply to all arbitration agreements whether concluded before or after the Draft Bill comes into force, subject to certain exceptions. These exceptions include (i) arbitrations commenced prior to the date the Draft Bill comes into force (pre-commencement arbitral proceedings); (ii) court proceedings (whenever commenced) in relation to pre-commencement arbitral proceedings (including in relation to an award issued in those proceedings); and (iii) court proceedings commenced prior to the Draft Bill coming into force. This differs from the Law Commission's original proposal, which provided that the Draft Bill would only apply to arbitration agreements entered into following the Draft Bill coming into force.

3.2 We agree with this proposed departure from the original proposal. The Law Commission's original proposal would have resulted in a dual track system applying in the English courts. Given that disputes may arise years after an arbitration agreement is concluded, and the potentially unlimited longevity of contracts, the original proposal would require the English courts to address applications under the unamended legislation for a potentially very considerable period after the changes came into force. The new proposal for temporal application of the amendments will ensure that the transition period is relatively short (i.e. only until existing arbitrations have concluded).

3.3 In particular, this temporal proposal will ensure that:

3.3.1 jurisprudence based on the new Section 6A develops as quickly as possible, promoting legal certainty; and

3.3.2 the case law on the new duty of disclosure in Section 23A develops as quickly as possible, especially given the Law Commission's conclusion in paragraph 3.26 of its final report that this was best left to case law to determine.

3.4 We have carefully considered the temporal application of the new Act to court proceedings that have been commenced in the English courts prior to the date of the Draft Bill coming into force, regardless of whether they are in relation to pre-commencement arbitral proceedings. While we have concluded that, on balance, section 17 of the Draft Bill strikes the correct balance, we summarise our analysis of this issue for completeness and in case similar considerations are raised by others.

3.5 Court proceedings commenced before the Draft Bill comes into force would include, for example, an application for a stay of court proceedings under section 9 of the 1996 Act or an application for an anti-suit injunction under section 37 of the Senior Courts Act 1981. On the basis of section 17 of the Draft Bill, the existing law would continue to apply to such proceedings. This would include, for example, *Enka v Chubb*. This may lead parties to make strategic choices about whether or not to commence legal proceedings before the Act comes into force, if the changes could give rise to a tactical advantage and potentially a different outcome (for example, the Court of Appeal may have reached a different decision in the recent case of *UniCredit Bank AG v. RusChemAlliance LLC* [2024] EWCA Civ 64).[1]

3.6 While such tactical applications are undesirable, they are likely to be limited in number and the impact short-lived. We have considered whether it may be beneficial to remove sub-clause (iii) from the Draft Bill but are concerned that doing so may lead to the disruption of existing cases currently ongoing before the courts. Those cases would face a change in legislation mid-way through the case, leading to uncertainty as to the merits of the parties' positions and potentially wasted costs. For example, the parties and counsel involved in the *Unicredit* case mentioned

[1] The Court of Appeal granted a final anti-suit injunction in relation to proceedings brought in Russia to protect a Paris-seated arbitration agreement in an English law governed agreement. The Court of Appeal's decision rested in part on its finding that the arbitration agreement was governed by English law, applying the Supreme Court's decision in *Enka v Chubb*. Application of Section 6A of the Draft Bill may lead to a different outcome on the same facts.

above could find themselves having to adopt different positions in respect of an appeal to the Supreme Court (if permission were sought and granted). We have therefore concluded that section 17 of the Draft Bill should be left as currently drafted (as amended by the Government, deleting prior section 6A(3) and adding new section 17(4)).

Extension to Northern Ireland

3.7 Since the 1996 Act does apply to Northern Ireland, it would seem sensible for Northern Ireland to benefit from the changes/amendments to the Act, particularly given the rigorous and careful process adopted by the Law Commission.

4. IS CLAUSE 1(2) OF THE BILL (ADDING NEW SECTION 6A TO THE ARBITRATION ACT 1996) SUFFICIENTLY CLEAR IN ITS DRAFTING?

4.1 Clause 1(2) addresses the law governing the arbitration agreement. It provides that where the parties have not expressly agreed on the law that governs the arbitration agreement, then the law governing the arbitration agreement will be the law of the seat.

4.2 We agree with this proposed addition to the Act. As per our response to the second consultation paper, we consider it to be a pragmatic solution in light of the criticism of and uncertainty created by the decision in *Enka v Chubb*. The new rule is clear and certain, especially for foreign parties who may not be familiar with, or understand how to interpret, *Enka v Chubb*.

4.3 We note Lord Hope's comment (as set out in Vol 834 of Hansard) that Section 6A(2) may not be needed as, to his mind, it does not add to the content of subsection (1). We respectfully disagree.

4.4 Section 6A(2) appears to be intended to clarify what is meant by the word "expressly" in subsection (1). We consider that express agreement can be recorded by the parties in two ways: either by including a provision within the arbitration clause which specifies which law governs it, or by including a general governing law provision which states that it extends to the arbitration agreement by clear wording to that effect (e.g. through a definition of "agreement" or "contract" that includes a reference to the arbitration clause).

4.5 However, in practice, many agreements will not address the law of the arbitration agreement expressly. Most frequently, contracts will include a governing law clause which purports to apply to the contract or agreement, but does not include any wording confirming whether or not this includes the arbitration agreement. Parties may not appreciate the concept of separability regarding arbitration agreements or its implications. Some will simply assume that a choice of governing law for the whole contract will also apply to the arbitration clause,[2] while others will only appreciate the importance of the governing law of their arbitration agreement once a disagreement on the issue arises.

4.6 Section 6A(2) would appear to be intended to make it clear to parties that the inclusion of a governing law clause which applies to a contract or agreement which does not also specifically refer to the arbitration agreement may not be conclusive of the governing law of the arbitration agreement. The language in Section 6A(2) introduces legislative certainty on a point which has been the issue of considerable debate in prior caselaw (including *Enka v Chubb*). Section 6A(2) makes clear that the Courts may reject an argument that a contractual governing law clause is intended to apply to an arbitration agreement, unless there is express language confirming that the governing law clause does apply to the arbitration agreement.

4.7 Although we acknowledge that the Courts are capable of determining whether or not an agreement is "express", we would prefer to retain this provision in order to provide clarity and avoid litigation on this issue.

4.8 We propose, however, that the following changes (in bold) be made to the wording to ensure that this provision is as clear as possible:

4.9 "*(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* ***unless that agreement expressly confirms that the particular law applies to the arbitration agreement***."

[2] Our experience in addressing this issue with transactional lawyers and in-house counsel reflects that many assume that the governing law clause is sufficient to indicate the applicable law of the arbitration agreement.

4.10 As stated in paragraphs 3.1-3.6 above, we agree that this provision should apply as soon as the Draft Bill comes into force in order to prevent a dual system split between old arbitration agreements that precede the amendments and new arbitration agreements.

5. DOES THE AMENDMENT TO SECTION 67 OF THE ARBITRATION ACT 1996 SET OUT A SUFFICIENTLY CLEAR APPROACH?

5.1 As stated in our response to the Law Commission's consultations, we consider that the proposed changes to the operation of section 67 will save time and cost, and as such are sensible and pragmatic. In particular, new section 67(3)(C) will prevent parties who have obtained favourable arbitration awards from facing duplication of time and cost from repeated jurisdictional challenges.

5.2 We appreciate the Law Commission's reasoning behind the recommendation that the changes to the operation of section 67 be set out in court rules rather than in the legislation (as set out in paragraphs 9.87- 9.94 of its Final Report). We also recognise the "belt and braces" approach of expressly authorising the departure from *Dallah* in legislation, with authorisation for rules of court to be drafted.

5.3 However, we consider that it would have been preferable that the draft court rules which will form the basis of the new section 67 regime be produced at the same time as the Draft Bill. While the Draft Bill provides a clear indication as to what these rules should cover, we would request that the rules of court are shared for consultation once drafted, in order to avoid them changing unnecessarily, which could undermine predictability. By way of final point, we also agree with Lord Mance that the new court rules should ensure that discretion should be retained for a de novo review if it is necessary in the interests of justice.

Herbert Smith Freehills LLP
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