

## **Written evidence from Clifford Chance LLP**

### **Special Public Bill Committee on the Arbitration Bill**

#### **Introduction**

1. Clifford Chance LLP is one of the world's largest law firms, with over 3,000 lawyers operating across five continents. The firm's international arbitration group has been one of the world's leading practices since it was formed in the mid-1980s. The arbitration practice operates on a global basis out of 23 of the firm's 33 international offices with substantive and leading practices in each. The firm has arbitration experts sitting in offices across all the major arbitration centres and throughout its global network – including in the United Kingdom, Continental Europe, Asia-Pacific, the Middle East and the Americas.
2. The firm's partners are embedded within the arbitration communities across the globe, playing integral roles and having relationships with the leading arbitral institutions, including the London Court of International Arbitration (LCIA) and International Chamber of Commerce's International Court of Arbitration. Marie Berard, who leads the firm's London International Commercial Arbitration Group, is a member of both the LCIA Court and the City of London Law Society's arbitration committee. Audley Sheppard KC, who led the firm's global arbitration practice until 2023, was Chair of the LCIA Board between 2017 and 2022.
3. This submission is informed by our experience in advising clients on the drafting of dispute resolution mechanisms in their international contracts and in acting as counsel in complex, high value disputes. This experience underpins our perspectives on London's status as a pre-eminent, and possibly the foremost, choice of arbitral seat for the world's leading businesses.
4. We set out below our views on the issues raised by the Committee.

#### **The proposed reforms and their likely impact on the arbitration market in the United Kingdom/the City of London**

5. London is consistently ranked as the most popular seat of arbitration globally, but the market has become far more competitive since the entry into force of the Arbitration Act 1996. We note that Singapore, which last amended its International

Arbitration Act in 2020, is fast emerging as a rival to London's traditional dominance as a global seat of choice. Other seats including Hong Kong and Paris also pose a threat to London's share of the international market.

6. Against this background, we have been supportive of the Law Commission's proposals to revise the Arbitration Act 1996 in order to align more closely with current international best practice, as reflected in recent updates to the procedural rules of major arbitral institutions and legislation in other popular seats of arbitration.
7. In our opinion, the Bill represents a carefully considered attempt to enhance the legislative framework for arbitration in England & Wales and Northern Ireland, keeping in place the fundamentals that have contributed to the success of London in particular as a seat of arbitration, while refining certain aspects with a focus on efficiency and user experience. Subject to the points raised below, we are of the view that the proposed reforms will ensure that the legislative framework for arbitration continues to be 'best in class' and that England & Wales and Northern Ireland remain the 'gold standard' for global dispute resolution in the twenty-first century.

### **Extension of Bill to Northern Ireland**

8. We agree that the Bill should extend to Northern Ireland, as does the Arbitration Act 1996 save for in limited respects.

### **Governing law of arbitration agreement: clause 1(2) of the Bill (adding new Section 6A)**

9. We agree with the comments made during the House of Lords' debate held on 19 December 2023 that, potentially, the words in clause 1(2) "of itself" may be a source of confusion. We would support the removal of those words.
10. Subject to removal of the words "of itself", we consider that clause 1(2) of the Bill is sufficiently clear as to the separability of arbitration agreements and the principles that will be applied in determining governing law.

### **Governing law of arbitration agreement: exception to rules**

11. We consider it sensible that the Government has amended the Bill to include exceptions to the statutory rules on determining the

governing law of arbitration agreements. An exception to the rules in respect of pre-commencement court proceedings, pre-commencement arbitrations, and court proceedings relating to those arbitrations will promote legal certainty.

### **Whether the amendment to section 67 sets out a sufficiently clear approach**

12. As explained in our responses to the Law Commission's Consultation Papers, we are supportive of proposals to amend section 67 to restrict a party's ability to relitigate jurisdictional issues that have been determined by a tribunal. We consider that the proposed amendment to section 67 sets out a sufficiently clear approach to the circumstances in which a challenge should be heard. However, as set out in our response to the Law Commission's Second Consultation Paper, we remain of the view that reform would be best effected through legislative change rather than the introduction of rules of court.

13. In our experience, section 67 rehearings can cost hundreds of thousands of pounds. In this regard, London is unattractive as a seat compared to other jurisdictions, in which rehearings on jurisdiction are generally not as expensive. We were of the view that a "harder" type of reform to the section 67 procedure would be the most appropriate to meet the demands of commercial users of London arbitration. We note the comments on this issue made by the Law Commission in its Final Report and its preference for a "softer" type of reform.<sup>1</sup> We appreciate that there are good arguments on both sides of the debate but, on balance, continue to think that reform should be implemented through legislative change rather than through rules of court, so as to provide greater certainty for users, in particular international users.

**Clifford Chance LLP**

**London, 6 February 2024**

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<sup>1</sup> Chapter 9 and, in particular, para. 9.36.