Written Evidence from Lord Hoffmann

I said at second reading that it would be better if subsection (2) of the new section 6A were omitted. I do not regard this subsection as a really serious defect in the bill. I think that arbitrators and judges would arrive at the correct answer whether it was there or not. But I think the bill would be better without it.

The apparent purpose of subsection (2) is to preclude an argument that if the parties provide that 'this agreement' shall be governed by a foreign law, they have thereby expressly agreed that the agreement to arbitrate in a clause of the the agreement shall be governed by the same foreign law. It is, after all, part of the agreement.

It seems to me very unlikely that any judge or arbitrator would buy such an argument because subsection (1) obviously treats the arbitration agreement as being, for this purpose, a separate agreement (as it often is for various other purposes) and requires that an agreement applying a foreign law should expressly refer to the arbitration agreement and not merely to the agreement as a whole. Subsection (2) is therefore unnecessary.

Does it matter? As I have said, probably not. But the provision that an agreement that a foreign law should apply to the agreement as whole should not 'of itself' be sufficient to satisfy subsection (1) may be puzzling. If not, 'of itself', what else would be required? The only possible answer is: an agreement which expressly refers to the arbitration agreement, i.e. subsection (1). If an express provision to preclude an argument of the kind I have mentioned is thought to be necessary, a better answer would in my view be '(2) For the purposes of subsection (1), the arbitration agreement shall be treated as a separate agreement.'

6 February 2024