Written Evidence from Professor Stavros Brekoulakis, National University of Singapore

To the Members of the Special Public Bill Committee on the Arbitration Bill,

Re: Bill to Amend the Arbitration Act 1996 ("the Bill")

I am submitting these comments in response to the Committee's Call for Evidence.

Before I turn my comments, it may be worth setting out my own credentials for the Committee's information. I am the Michael & Laura Hwang Professor in International Arbitration at the National University of Singapore and an arbitrator practicing at 3 Verulam Buildings (Gray's Inn). I have been involved in international law and arbitration for more than 20 years both as practitioner and academic. As practitioner, I have been appointed in more than 80 arbitrations (investment and commercial) under all major arbitral institutions and the UNCITRAL Rules. As academic, I have published eight monographs, books and edited volumes and more than 30 articles in leading peer-reviewed law journals. I have also served in several public positions and commissions of trust including as Co-Chair of the International Council of Commercial Arbitration Task Force on Third Party Funding; member of the London Bar Reform Committee; Governing Body of ICCA; LCIA Court; and ICC's Commission on Arbitration.

I now turn to my comments about the Bill. I consider that the Bill is generally well-drafted and balanced. There are only two matters which the Committee would need to further consider, in my view: the first matter concerns section 6A of the Bill which effectively provides that, unless the parties expressly agree otherwise, the arbitration agreement shall be governed by the law of the seat. The new provision does not clarify whether the law of the seat will include its conflict of laws rules. This is an important point to clarify; otherwise, it may lead to confusion. In practice, the question of which law governs an arbitration agreement tends to arise in relation to non-signatory parties. The Enka case, for example, was a non-signatory party case. The question of whether a non-signatory party is bound by an arbitration agreement is a question which depends on a variety of factual circumstances and legal theories, including theories of assignment, agency, alter ego, third party beneficiary etc.

It would not be appropriate or, indeed, practical to decide whether the non-signatory party should be bound by an arbitration agreement by reference to the law of the seat, under some of these theories. For example, under generally accepted conflict of law rules, the question of whether and to what extent an agent has valid authority to represent another party is traditionally governed by the personal law of the agent, namely the law of its business establishment or the law of its habitual residence. Thus, in a London-seated arbitration, the question of whether a foreign individual, who signed an arbitration agreement, has valid authority to represent a foreign company would typically be governed by the law of the place of incorporation of the foreign company; not English law.

Equally, in a London-seated arbitration, the question of whether a non-signatory foreign parent company is the alter ego of a signatory foreign subsidiary would typically be governed by the law of the place of incorporation of the foreign parent company; not English law.

Similarly, in a London-seated arbitration, the question of whether a non-signatory is bound by an arbitration clause in a contract the benefit of which the non-signatory is seeking to enjoy, a third-party beneficiary would typically be governed by the law of the contract.

Is the position now going to change under section 6A of the Bill? It is not clear to me. If the reference to the "law of the seat" in section 6A is meant to include the "conflict of laws" of the "law of the seat", the position will remain the same. In fact, the "new rule" in section 6A will not be "new" at all. Because under English choice of law rules, the law governing an arbitration agreement is the law which is most closely connected with the arbitration agreement; and, in the above examples, the law most closely connected with the arbitration agreement will be the law of the place of incorporation of the foreign company (agency; alter ego) or the law of the matrix contract (third-party beneficiary); not the law of the seat. Indeed, the basis of discussion in all relevant UK decisions, including in Enka, has been the typical legal principle of private international law of the "most closely connected law".

If the reference to the "law of the seat" in section 6A is not meant to include the "conflict of laws" of the "law of the seat", then the outcome will defy traditional and well-established principles of private international

law. It would be odd, for example, to determine the question of whether a Russian corporation abused its corporate status and used another Russian subsidiary to avoid its contractual obligations under English law, being the law of the seat.

There has been no clarity on this matter, and I can clearly foresee counsel in a London-seated arbitration making valid submissions supporting either view as to whether the reference to the "law of the seat" in section 6A includes English "conflict of laws" or not.

The second matter concerns a question which the Bill does not address. This is the question of whether a successful party in arbitration, which has been funded by third party funding, can recover not only its arbitration costs, but the funding costs too, i.e. the substantial fee which successful party will have to pay to the funder. The question first came up before the English High Court in the 2016 decision of Essar v Norscot. In this case, the tribunal awarded the funding costs to the claimant under section 59 of the Arbitration Act 1996. In reviewing the award, Justice Waksman took a functional approach to determining the term "other costs" in section 59 and found that funding costs fall within such term as a matter of language, context and logic. The decision caused controversy, but some commentators sought to justify Essar as being particular to its facts (i.e., the respondent had exhibited, according to the tribunal, egregious behaviour which justified the award of funding cost).

However, the issue came up more recently in the 2021 case of Tenke v Katanga. In Tenke, again the tribunal found that the funding costs were reasonable and recoverable as part of "other costs" of arbitration under section 59 of the Act. The tribunal's decision was challenged before the English High Court including on the grounds that the tribunal exceeded its jurisdiction by treating funding costs as "other costs". The English High Court upheld the award, finding that the question of whether funding costs fall within the definition of "other costs" in section 59 of the Arbitration Act is a legal question; not a matter of whether the tribunal exceeded its power.

Essar was therefore left standing. But the Bill ought to address a real issue which arises from Essar. Funding costs exceed several times the amount of actual legal costs of the claimant (they typically amount to 300% the initial funding investment). Thus, awarding funding costs to successful parties gives rise to a real concern that the potential exposure

of respondents might become significant when a claimant is funded by a third-party funding. Importantly, the respondent may not even be aware of the claimant’s funding arrangements until the end of the arbitration. There are also concerns about an undesirable distinction between the position in proceedings before the courts, where such costs are not recoverable, and the position in arbitration.

I would be happy to further elaborate on the above comments orally, if helpful.

Yours sincerely,

Stavros Brekoulakis

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