WRITTEN EVIDENCE FROM MR JUSTICE FOXTON AND MR JUSTICE HENSHAW

HOUSE OF LORDS SPECIAL BILL COMMITTEE ON THE ARBITRATION BILL
NOTE FROM MR JUSTICE FOXTON AND MR JUSTICE HENSHAW

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(1) Introduction

1. This Note is sent in response to the invitation from the Clerk to the Special Committee, addressed to Mr Justice Foxton and Mr Justice Henshaw, to provide a written submission following the Committee's Call for Evidence published on 25 January 2024. The undersigned sit in the Commercial Court in London, of which Mr Justice Foxton is currently the Judge in Charge, and were two of the co-authors of the Responses submitted on behalf of the judges of the Business & Property Courts ("*B&PC*") in London to the Law Commission's consultation papers and draft Bill.

2. We are conscious that judges do not generally comment on the merits or likely effect of prospective legislation, save in limited circumstances such as where particular judges are consulted on matters affecting the administration of justice within their particular area of judicial responsibility. We regard the Arbitration Bill as falling within this latter category, but make clear that the views we express in this Note are ours alone, and are tentative in the sense that they should not be regarded as prejudging the outcome of any contested issues that might in future arise on matters within the scope of the Bill.

3. The first, general, question raised in the Call for Evidence is whether respondents agree with the proposed reforms and whether the reforms achieve what they are intended to. We are aware that the Law Commission has carefully considered proposals from a wide range of stakeholders, including submissions from the B&PC, in arriving at the draft Bill. With the very limited qualification outlined below, we support the proposed reforms, for the reasons which the Law Commission have given, and believe that the reforms will enhance the appeal of England and Wales as a seat for international arbitration.

4. In these circumstances, we have confined this response to addressing the specific questions raised and dealing with the limited point on which we believe the draft Bill could be enhanced. If it would assist the Special Committee to have copies of the B&PC's submissions to the Law Commission, these can be provided.

(2) Law applicable to arbitration agreements (clause 1)

5. A number of the specific questions raised concern clause 1, which deals with the law applicable to arbitration agreements.

6. In the B&PC's Responses dated 13 December 2022 (section 2) and 21 May 2023 (section 2) to the Law Commission's two consultation papers, we supported the introduction of a provision such as clause 1 of the present Bill on the law applicable to an arbitration agreement. Briefly, we consider the law as it currently stands creates lack of clarity as well as a risk of arbitration processes being ultimately ineffective in some circumstances, contrary to the reasonable expectations of the parties. The proposed reform – a presumption in favour of the law of the seat of the arbitration – addresses these problems effectively whilst leaving the parties free to take a different course should they so agree. It aims to give effect to the parties' wish, at the broadest level, to resolve disputes by an arbitration process leading to a valid, binding award; and treats the dispute resolution provisions of the parties' contract as a single, coherent unit collateral to the main contract provisions.

7. The Call for Evidence includes a specific question relating to clause 1 of the Bill. That is, whether clause 1(2), which inserts a new section 6A, is sufficiently clear in its drafting, having regard to the Debate at Hansard 19 December 2023 Grand Committee Col 429GC-430GC and 433GC to 434GC. During that Debate, the question was raised as to whether proposed new subsection 6A(2) is necessary, and what it adds to new subsection 6A(1).

8. The proposed section 6A(1) provides that the arbitration agreement will be governed by *"the law that the parties*

expressly agree applies to the arbitration agreement", failing which the law of the seat. However, it was held in *Enka v Chubb* [2020] UKSC 38 that where the law applicable to the arbitration agreement is not specified, a choice of governing law for the contract will generally apply to an arbitration agreement which forms part of the contract (§ 170(iv)). On that basis, where the parties have expressly agreed which law will govern the contract as a whole, they could be regarded as thereby having *"expressly agree[d]"* that that law shall apply to the arbitration agreement (which forms part of it), within subsection 6A(1). That would render the intended reform ineffective.

9. The clear objective is for the law of the seat to apply unless the parties have reached an agreement on governing law relating expressly <u>and specifically</u> to the arbitration agreement. A number of drafting techniques might have been used to achieve this. The draft Bill seeks to do so by making clear that (a) only an express choice of governing law for the arbitration agreement will displace the presumption in favour of the law of the seat (proposed section 6A(1)), and (b) an express choice of law for the contract as a whole is insufficient for that purpose (section 6A(2)). It will be for individual judges for determine, in the light of the arguments presented to them, to construe sections of the new Act. For our part, we understand the purpose of proposed section 6A(2) and how it aims to address the potential problem alluded to in § 6 above. Further, any court called upon to interpret the new section 6A will be entitled to have regard to the terms of the Law Commission report.

(3) Temporal scope of the Bill (clauses 1 and 17)

10. The Call for Evidence invites comment on changing the Bill from the Law Commission's draft by providing that the alterations to the law apply to all arbitration agreements whenever made except those where arbitrations have already commenced. We address this next, because the departure from the Law Commission's draft Bill relates specifically to clause 1 on governing law.

11. This topic was the subject of a Note dated 27 September 2023, sent on behalf of the Business & Property Courts, on the Law Commissions' draft Bill. Clause 1 in the draft Bill provided for the proposed Act to come into force when enacted, subject to a power to make transitional provisions, but draft clause 1(2) would have meant that new section 6A applied only to post-Act arbitration agreements. For the reasons given in that Note, we favour the provision now proposed in the Bill. It avoids the problem of the old law continuing to apply for many years to come, and is logically consistent with the approach taken to temporal application in both the Arbitration Act 1996 and the Arbitration (Scotland) Act 2010. At the same time, any parties to current arbitration agreements who do not wish the new presumption to apply will be free to supplement their contract by specifically agreeing which law shall govern the arbitration agreement.

(4) Challenges to the jurisdiction of the arbitral tribunal (clause 11)

12. As to clause 11, the Call for Evidence seeks responses on whether the proposed amendment to section 67 of the Arbitration Act 1996, relating to challenges to the substantive

jurisdiction of the arbitral tribunal, sets out a sufficiently clear approach.

13. By way of context, we note the relatively small number of jurisdiction challenges issued each year. The Commercial Court's Annual Reports for 2019/20, 2020/21, 2021/22 and (currently in draft) 2022/23 indicate that only 19, 15, 27 and 8 challenges were issued under section 67 during those years respectively. Moreover, very few section 67 challenges have in practice involved the court hearing substantial amounts of, or any, oral evidence (that apparently being a key concern of some respondents to the consultation). Many have turned on questions of pure law or contract interpretation, or have been dismissed on other grounds such as loss of the right to object.

14. Conversely, there remains a residual category of cases, for example where the existence or otherwise of any arbitration agreement at all is contested and depends on oral evidence as to contract formation (as in, for example, *A v B* [2015] EWHC 137 (Comm)), where it remains appropriate for the court to hear oral evidence in order to determine whether or not the parties have consented to the putative arbitral process.

15. In the B&PC's 13 December 2022 note, we expressed reservations about the Law Commission's original proposal to limit jurisdiction challenges to a review of the tribunal's decision, in cases where the challenging party had challenged jurisdiction before the tribunal. We suggested that any reform in this area should be limited to clarification that in hearing a jurisdiction challenge the court can exercise a variety of case management powers (including declining to rehear oral evidence in appropriate cases, exclusion of evidence on fairness grounds, summary judgment,

preliminary issues, security for costs and security in the amount of the award). In the B&PC's 21 May 2023 note, section 3, we commented on the Law Commission's revised proposals. Among other matters, we disagreed with the proposal that the court should give deference to the tribunal's findings regarding witness evidence heard when determining a challenge to its own jurisdiction.

16. The Law Commission's final proposals, reflected in clause 11 of the Bill, leave it to the CPR Rule Committee to decide what, if any, procedural rules should be provided, but in certain respects seeks to anticipate what those rules will provide, and, to that extent, may limit the ability of the CPR Rule Committee to formulate rules in the manner it thinks best, and to revise that formulation in the light of experience of the rules' operation. In particular:

    i) The proposed new s.67(3B) appears to confer a discretion on the Rules Committee when issuing rules addressing the procedure on a s.67 application ("*may, in particular, include provision*").

    ii) However, on one reading, the proposed subsections 67(3B) and (3C) might limit the rule-making power to rules having the effect set out in subsection 67(3C) (on which we comment below).

    iii) We would not support any attempt to limit the scope of the rule-making power, or to pre-determine the manner in which it can be exercised. That would create scope

for unnecessary challenges as to whether any particular procedural rule falls within the scope of s.67(3C), and limit the ability of the Rule Committee to revise the rules with the benefit of experience of their operation in practice.

17. As to the three potential new rules provided for in proposed new section 67(3C):

    i) Subsection (a), relating to raising new grounds of objection, appears unlikely to represent a significant departure from the present position, reflected in section 73(1)(a) of the 1996 Act (which prevents reliance on "*any objection*" not raised on a timely basis).

    ii) Subsection (b), about fresh evidence, is similar to the rule applied to merits arguments in criminal appeals. Some case law in Singapore applies such an approach in relation to arbitration (e.g. *Government of the Lao People's Democratic Republic v Sanum Investments Ltd* [2015] SGHC 15). Such a rule may have the salutary effect of inhibiting parties from deliberately keeping additional evidence up their sleeves for use in court later if needed: although in our experience parties rarely hold back favourable material (indeed they have no incentive to do so).

    iii) Subsection (c) concerns restricting the rehearing in court of evidence the tribunal has already heard. We have already noted the relative rarity of such an occurrence. Where contested oral evidence is important to the jurisdiction issue, then the consent principle (that

parties should not be bound by the conclusions of an arbitral process to which they in fact never agreed) requires the court to be able to form its own view on such evidence, rehearing it if appropriate (as opposed to relying on transcript of evidence, if they exist). We regard it as a key feature of the proposed new provision that it will leave it to the court to decide where the interests of justice lie. In that sense, the proposed rule can accommodate different approaches along a spectrum of cases. At one end lie cases where any oral evidence of fact is peripheral or can easily be taken from the transcripts. At the other end will be the occasional case where the court considers it important for it to hear the evidence itself.

iv) When the evidential ground shifts on a s.67 challenge as between the position before the arbitral tribunal and the court, it is generally because of the greater ability in court proceedings to obtain compulsory production of documents from the other side or third parties. If documents emerge which were not available in the arbitration, they very often generate witness or expert evidence addressing them. It is not clear to us how the proposed limitations in s.67(3B) are intended to operate in this situation.

18. For these reasons, we would favour modifying clause 11 of the draft Bill so as to ensure that (a) it is clear that the Rule Committee's powers are not confined to a prescribed set of rules of the kind which currently appear in proposed s.67(3C), and (b) if s.67(3C) is retained in some form, the proviso which currently appears in s.67(3C)(c), relating to that which

the court considers to be necessary in the interests of justice, applies to all limbs of the subsection.

(5) Other provisions

19. As to clause 16, the Call for Evidence invites responses on the proposal to extend the Bill to Northern Ireland. That is a matter for others.

(6) Impact

20. The Call for Evidence seeks responses on the impact the reforms are likely to have on the arbitration market in the United Kingdom/the City of London. This is largely a question for others. We do, however, wish to say that the proposed reform on governing law (clause 1), including its immediate application to all post-Act arbitration agreements, is important in order to address a feature otherwise liable to be detrimental to the arbitration market here. More generally, we would expect the overall impact of the Bill, if enacted, to be positive.

Mr Justice Foxton (Judge in Charge of the Commercial Court)
Mr Justice Henshaw (Commercial Court)

6 February 2024