Written Evidence from Lloyds' Market Association

LMA response to the Special Public Bill Committee's Call for Evidence on the Arbitration Bill

The Lloyd's Market Association (LMA) represents the fifty-two managing agents at Lloyd's, with 93 active syndicates underwriting in the market and also the three members' agents, which act for third party capital. Managing agents are "dual regulated" firms, regulated by the Prudential Regulation Authority (PRA) and Financial Conduct Authority (FCA) and members' agents are regulated by the FCA. For 2023, premium capacity is over £48 billion.

In addition to the PRA and FCA, Lloyd's managing agents are subject to bye-laws and an oversight framework set by the Corporation of Lloyd's which is, itself, a statutory regulator.

The business underwritten in the Lloyd's market is primarily non-life insurance and reinsurance.

The business is international, and Lloyd's is a significant international exporter of services, being licenced to do business in many countries around the world. For the 2022 calendar year, nearly 70% of premium related to North America, approximately 20% to UK and Europe and approximately 10% Asia/Pacific and rest of the world. Lloyd's is predominantly a wholesale market, with the majority of business being transacted via intermediaries, both in the UK and worldwide.

We welcome the chance to respond to the Special Public Bill Committee's (the "Committee") call for evidence on the Bill to Amend the Arbitration Act 1996 (the "Bill"). We have reviewed the proposed reforms and the questions posed in the Committee's call for evidence and we have addressed these questions below.

Whether you agree with the proposed reforms and whether the reforms achieve what they are intended to;

Statutory duty

We agree with the proposal in the Bill to introduce a statutory duty on arbitrators to disclose any circumstances which might give rise to justifiable doubts about their impartiality (Clause 2). We think this will clarify the existing duty and put its requirements beyond any doubt.

Powers of the arbitral tribunal

We agree with the proposals in the Bill to confer various powers to the arbitral tribunal, namely:

- The power to award costs even if the tribunal lacks substantive jurisdiction (Clause 6). We think this to be a fair and efficient way of disposing of proceedings.

- The power to make awards on a summary basis (Clause 7). We think this will make arbitrations more efficient and consistent with the summary judgment procedure in English court proceedings. We also believe that this will save time and costs in terms of disposing of unmeritorious claims, and allowing issues between the parties to be narrowed at an early stage.

- The power to emergency arbitrators to issue peremptory orders and the ability to enforce them through the court or directly to the court to issue its own order (Clause 8). We think this will enhance the effectiveness of emergency arbitrators and give them the same enforcement options as other arbitrators.

Powers of the court

We also agree with the conferring of various powers on the court, as set out in the Bill:

- The power of the court to make orders in support of arbitral proceedings against third parties (Clause 9). We welcome this clarification, which will resolve the conflicting case law on this issue.

- Proposing to provide the remedies of remittance for reconsideration and setting aside any type of award. We believe that this proposal renders section 67 consistent with the scheme of remedies in sections 68 and 69.

- The simplification of the procedure for challenging arbitral awards on substantive jurisdiction (Clause 11). We anticipate this will avoid costly re-hearings which are necessarily duplicative, and therefore reduce delays and the risk of inconsistent (oral) evidence being given.

Minor amendments

We agree with Clause 13 proposing to have section 9 now expressly state that an appeal is available against a court decision on staying legal proceedings. We believe this would be consistent with the comments given by Lord Nicholls in *Inca Europe v First Choice Distribution (2000).*

Finally, we agree with Clause 15 proposing the repeal of provisions relating to domestic arbitration provisions.

Areas of disagreement

The following are the proposed reforms that we disagree with.

Law applicable to the arbitration agreement

We disagree with the Bill's proposal that the law of the arbitration agreement is the law of the seat unless the parties expressly agree otherwise in the arbitration agreement itself. As we previously explained in our response to the Law Commission's Second Consultation on the Arbitration Act in May 2023, we believe that parties expect that when they have chosen a particular law to govern their contract, that law will apply to the entirety of the agreement,

including the arbitration agreement, unless they have stated otherwise. If a jurisdiction does not recognise the principle of severability of an arbitration agreement from the matrix contract, the proposal may cause additional confusion and give rise to further disputes arising from a clash between the laws in relation to arbitration.

Immunity of arbitrator

While we agree that arbitrator immunity should be extended against liability for resignations, we do not agree that the standard to prove liability should be one of "unreasonableness" (Clause 4). The term "unreasonable" is not defined in the Bill and leaves room for uncertainty. In most circumstances, an arbitrator will give a reason as to why they have resigned, therefore it would be difficult to establish whether said reason is "unreasonable".

For example, if an arbitrator resigns part way through a hearing because of a matter which would give the appearance of bias which they should have disclosed at the outset but negligently or recklessly failed to do so, we think that the arbitrator should incur liability for costs. Yet, their resignation could be said to be for the reason of bias and under the current proposal, may escape liability.

If the Government is to retain the term "unreasonable", we propose that the relevant clause in the Bill be amended to exclude from immunity any "unreasonable" acceptance of an appointment by an arbitrator, rather than the "unreasonable" resignation of an arbitrator.

We also do not agree with the proposal that an arbitrator will not be liable for the costs of an application to court under section 24 for their removal, unless the arbitrator has acted in bad faith (Clause 3). Currently, section 23 deals with a recalcitrant arbitrator only by providing that the arbitrator may lose their entitlement to fees and expenses. We believe that if the arbitrator refuses to resign and has to be removed, they should pay the costs. However, if one of the parties supports them in refusing to resign the costs should be paid by that party to avoid the risk that arbitrators feel under pressure to resign due to the potential costs.
Additionally, we do not agree with the use of the words "bad faith". We do not understand that term to have a common law or statutory definition, leaving room for ambiguity and uncertainty.

Provisions in the Government's bill that differ from the version proposed by the Law Commission concerning:

Changing the bill so that it now provides the changes to the law apply to all arbitration agreements whenever made except those where arbitrations have already commenced;

We disagree that the changes to the law proposed by the Bill should apply to all arbitration agreements whenever made except those already commenced. If the Government is to implement the proposed reforms, the nature of arbitration agreements already entered into but where arbitration has not already commenced will change, potentially contrary to the parties' intentions. This is especially true in relation to the proposals to make the seat the key determinant of the governing law of the arbitration agreement.

We therefore suggest that if the proposed reforms are to go ahead that the changes apply to arbitration agreements entered into after the amended law has been enacted.

What impact the reforms are likely to have on the arbitration market in the United Kingdom/the City of London

While the Bill makes a limited number of significant proposed changes, such as the proposed alignment of governing law to seat, we do not believe that the proposed changes will have a big effect on the arbitration market in the UK.

Amendments to provisions that would have had a much stronger impact were considered but not adopted by the Law Commission, such as widening the scope for the bringing of appeals. In relation to this point in particular, we think the failure to relax the test for the bringing of appeals is a missed opportunity, as such a relaxation would result in more appeals being considered by the higher courts, thus contributing to the continuing development of English insurance and reinsurance law. It is because of this body of law that English law is often chosen in the highest value insurance and reinsurance contracts even where the parties are not English, as the parties know that English law provides them with a

level of certainty not seen in other countries' laws, which in turn would feed the UK arbitration market.

There is no doubt that the Bill provides further clarity and that is to be welcomed.

Is clause 1(2) of the Bill (adding new Section 6A to the Arbitration Act 1996) sufficiently clear in its drafting (see Hansard 19 December 2023 Grand Committee Col 429GC-430GC and 433GC to 434GC)[2]?

We have already set out our views on proposed section 6A (1) above on the alignment of governing law of the arbitration agreement to seat, in the absence of an express agreement on the choice of law.

Nevertheless, if section 6A (1) is adopted as drafted, we think there is no need for section 6A(2), which simply says that the governing law of the matrix contract is not express agreement for the purpose of section 6A(1)(a). We believe that the words of section 6A(1)(a) are sufficiently clear to render section 6A(2) otiose.

Whether the amendment to section 67 of the Arbitration Act 1996 relating to challenges to substantive jurisdiction) set out a sufficiently clear approach?

We believe that the approach is sufficiently clear.

6 February 2024