Written evidence from Professor Renato Nazzini FCIArb[1] and Aleksander Kalisz[2]

Response to the Call for Evidence
Special Public Bill Committee on the Arbitration Bill

Introduction

This Response is submitted by Professor Renato Nazzini and Aleksander Kalisz of the Centre of Construction Law & Dispute Resolution at King's College London (the 'Centre'). The Centre is one of the world-leading academic institutions focusing on all aspects of construction law including international arbitration and other forms of dispute resolution. The Centre responded comprehensively to both Law Commission consultations, publishing the 'Response to the Law Commission Review of the Arbitration Act 1996' and 'Response to the Law Commission Review of the Arbitration Act 1996 (Second Consultation)', with the Law Commission agreeing with most of our conclusions.

We are submitting this Response to respond to the call for evidence issued by the Special Public Bill Committee on the Arbitration Bill. We rely on our Responses to the Law Commission as well as our practical and academic experience in international arbitration.

1. **Whether you agree with the proposed reforms and whether the reforms achieve what they are intended to**

We agree with the proposed reforms. Our view is that the UK practice of international arbitration is in good health and remains globally competitive. For this reason, the approach of the Bill, which retains the overall structure and most of the provisions of the Arbitration Act 1996 (the "Act") while making interventions where necessary, is to be commended.

Furthermore, it is essential that our arbitration law is kept under review and updated to continue to provide a gold standard for business globally. This goes beyond dispute resolution. Arbitration plays a crucial role in ensuring the attractiveness of English law and the British legal sector from an international commercial standpoint. A Report by The Law Society of England & Wales found that the UK legal sector is the second-largest legal sector globally and English law governs a considerable volume of international trade, deals and contracts. Arbitration contributes to this

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success with the UK hosting numerous arbitral institutions and membership organisations including the London Court of International Arbitration, the Chartered Institute of Arbitrators and many institutions involved with construction arbitration including the Royal Institution of Chartered Surveyors or the Royal Institute of British Architects.

2. **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 agree with the changes made to the Bill on three grounds.

First, as was discussed in depth in the course of the Law Commission consultations, parties are unlikely to have intended for the (pre-amendment) rules in *Enka v Chubb* (see *Enka Insaat Ve Sanayi A.S. v OOO Insurance Company Chubb* [2020] UKSC 38) to apply to their arbitration agreements. On balance, if parties select England, Wales or Northern Ireland as the seat of their arbitrations, they must have also intended the Act to apply to the key elements of their arbitration agreement. (see Renato Nazzini, 'The Law Applicable to the Arbitration Agreement: Towards Transnational Principles' (2016) 65(3) ICLQ 681 and Renato Nazzini, 'The Problem of the Law Governing the Arbitration Clause between National Rules and Transnational Solutions' in Nazzini (ed), *Construction Arbitration and Alternative Dispute Resolution* (Routledge 2021))

Furthermore, subjecting arbitration agreements to different sets of rules depending on the date of the agreement would give rise to two parallel regimes, one following *Enka v Chubb* and another applying the proposed section 6A of the Act. This would increase, not reduce, confusion. One of the strengths of the Act is that it is clear and can be understood by businessmen without engaging in overly complex legal "metaphysics". The Bill, therefore, proposes an attractive and easily understandable set of rules. It would be artificial to subject the parties to conflicting pre- and post-amendment regimes. The conclusions of the two regimes could be radically different and this would be highly surprising to international businesspeople.

Thirdly, the developments of these two parallel regimes, potentially for many years to come, would be inefficient to both arbitral tribunals and courts.

- **Extending the extent of the bill to Northern Ireland**

Although the question relates to the constitutional division of competence between the UK Parliament and the devolved legislature, we agree with the extension of the amended Act to Northern Ireland. From the standpoint of international commercial parties that are unaccustomed to the constitutional regime of the UK, greater uniformity is more attractive.

Further, although the practice of arbitration is concentrated in London, a wider application of the Act may give parties access to a wider and more competitive market when selecting their seat as well as legal advisers and representatives.

We also note that the Northern Irish courts have made important contributions to the interpretation of the Act: see eg *Londonderry Port and Harbour Commissioners v WS Atkins Consultants Ltd* [2011] NIQB 74 and *Trunk Flooring Ltd v HSBC Asset Finance (UK) Ltd* [2015] NIQB 23.

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

We believe that the reforms would have a positive impact on the arbitration market in the UK and London, allowing it to retain its leading position on the global stage. Apart from the commercial reasons outlined above, retaining a world-leading arbitration regime has a considerable soft impact. Among many examples, a significant number of top-performing students elect to pursue studies at King's College London and other academic institutions in the hope of pursuing a career in dispute resolution or deepening their knowledge of arbitration.

However, we consider that it would be advisable to consider improving the following provisions:

1. Proposed section 6A on the law applicable to the arbitration agreement

We comment on this proposed section below.

2. Proposed section 23A on the duty of disclosure

Although we agree with the inclusion of a provision on disclosure, we query whether the new proposed section 23A(1) is an unnecessary complication. The reason for our concern is that the duty of disclosure is owed to the parties and not to a person approaching a prospective arbitrator in connection with the appointment, as the proposed subsection (1) appears to suggest.

The Supreme Court in *Halliburton Company v Chubb Bermuda Insurance Ltd* [2020] UKSC 48 states clearly that the arbitrators' duty of disclosure is owed to the parties who are then at liberty to determine whether to object to the appointment of the arbitrator. For example, Lord Hodge said at paragraph 70:

> *One way in which an arbitrator can avoid the appearance of bias is by disclosing matters which could arguably be said to give rise to a real possibility of bias. Such disclosure* ***allows the parties*** *to consider the disclosed circumstances, obtain necessary advice, and decide whether there is a problem with the involvement of the arbitrator in the reference and, if so, whether to object or otherwise to act to mitigate or remove the problem (…) When, on being asked to accept an appointment, an arbitrator knows of a matter which ought to be* ***disclosed to the parties*** *to the reference, prompt* ***disclosure to those parties*** *of that matter provides the safeguard as the quality of impartiality is shown to have been there from the beginning.* (emphasis added)

Similarly, the IBA Guidelines on Conflicts of Interest 2014 provide that the disclosure test is gauged against party perceptions and clarify that disclosure is a duty owed to the parties. Guideline 3 states:

> *If facts or circumstances exist that may,* ***in the eyes of the parties****, give rise to doubts as to the arbitrator's impartiality or independence, the arbitrator shall disclose such facts or circumstances* ***to the parties****, the arbitration institution or other appointing authority (if any, and if so required by the applicable institutional rules) and the co-arbitrators, if any, prior to accepting his or her appointment or, if thereafter, as soon as he or she learns of them.* (emphasis added)

Therefore, the key duty is to the parties and is adequately, and in our view comprehensively, set out in the proposed section 23(A)(2). As a matter of practice, an individual approached in the situation described in the proposed subsection (1) will of course make a disclosure, but this is best left to the practice of arbitration and professional or ethical rules. After all, let us assume that an individual does not comply, or fully comply, with the duty under the proposed subsection (1), but fully and promptly complies with the duty under the proposed subsection (2). Does it really matter for the integrity of the proceedings that the duty under the proposed subsection (1) was not complied with? And yet, under current drafting, such a breach could be relied upon in setting aside or enforcement proceedings, giving rise to unnecessary complications. It would be preferable, in our view, in order to avoid complications and unnecessary arguments and litigation, to follow established arbitration

practice and provide that the duty of disclosure is to the parties as set out in the proposed subsection (2) only.

We recognise that the UNCITRAL Model Law on International Commercial Arbitration (the 'Model Law') appears to provide for a disclosure obligation by a prospective arbitrator at the time he is approached. Article 12(1) of the Model Law provides:

> *When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him.*

However, we do not recommend following the language and approach of the Model Law, for the reasons stated above. Furthermore, the provision quoted above is unclear, to the extent that the first sentence does not even specify the persons to whom the duty of disclosure is owed. The Model Law should be carefully considered but not adopted slavishly as its text may be incompatible with the linguistic precision of UK statutes and with solutions developed by English law. We take the view that the approach in *Halliburton* that the duty of disclosure is owned to the parties is clear, legally sound and commercially attractive.

Finally, removing the proposed subsection (1) would also be compatible with any additional disclosure obligations that prospective arbitrators owe under the applicable arbitration rules, such as to the arbitral institution: ICC Arbitration Rules 2021, Articles 11(2)-(3) and 13(2); LCIA Arbitration Rules 2020, Article 5.4; SCC Arbitration Rules 2023, Article 18(2)-(4).

3. The proposed provisions on the enforcement of orders and directions of an emergency arbitrator

We consider that the proposed section 41A(2) should make reference to "*order or award*" of the Emergency Arbitrator, rather than "*order or directions*". The inclusion of "*directions*" is redundant as they would be, or be contained in, an order or an award. However, it is important, in our view, that awards issued by an Emergency Arbitrator can also benefit from the peremptory order procedure.

Under many arbitration rules, Emergency Arbitrators can issue both orders and awards: see LCIA Arbitration Rules 2021, Article 9.8: "*The Emergency Arbitrator may make any order or award which the Arbitral Tribunal could make under the Arbitration Agreement*"; see also SCC Arbitration Rules 2023, Article 37(3) and Appendix II, Article 1(2); SIAC

Rules 2016, Schedule 1, Rule 8. Furthermore, there is considerable uncertainty as to whether awards issued by Emergency Arbitrators are enforceable under section 66 of the Act.

We also take the view that the amended section 44 should make it clear that the court has the power, under that section, to make orders to enforce an order or award of an Emergency Arbitrator. If this were not the case, an order or award of an Emergency Arbitrator in proceedings not seated in England, Wales or Northern Ireland, would remain unenforceable under the Act (the peremptory order procedure applying only if the seat of the arbitration is in England, Wales or Northern Ireland). This would place the UK and the City of London on a backfoot compared to jurisdictions where emergency arbitrator orders or awards made in proceedings seated abroad are enforceable: see Singapore International Arbitration Act 1994, section 2(1); see also emerging pro-enforcement trends in case law, eg *Air Ctr. Helicopters, Inc. v Starlite Inv.s Ireland Ltd.,* 2018 WL 3970478 (N.D. Tex. Aug. 15, 2018) (USA); *VEB.RF v Ukraine*, Case No 824/178/19 (Ukraine).

- **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*)?**

Having carefully reviewed the Hansard report and the comments made on clause 1(2) of the Bill, we are of the view that the proposed section 6A(2) should be retained, but that the words "*of itself*" should be removed.

Whilst it may be argued that the proposed section 6A(1) is sufficiently clear by requiring that the "*parties expressly agree*" which law applies to the arbitration agreement, the question remains what an express agreement is. The line between an implied and express choice of the law of the arbitration agreement can be blurred since the arbitration clause forms part of the main contract. An election of the law of the main contract by the parties can be interpreted as an express choice of law of the arbitration agreement. For example, in the case *BCY v BCZ* [2016] SGHC 249, the Singapore High Court said at paragraph 59:

> *When a choice of law clause (such as the one here) stipulates that the "agreement" is to be governed by one country's system of law, the natural inference should be that parties intend the express choice of law to "govern and determine the construction of* all *the clauses in the agreement which they signed* including the arbitration agreement*" (…). To say that the word "agreement" contemplates all the clauses in the main contract save for the arbitration clause would in fact be inconsistent with its ordinary meaning.* (emphasis in original)

Furthermore, one can imagine more difficult circumstances. For example, a contract may define "*Agreement*" as encompassing also the arbitration clause. The contract may then contain another clause providing that "*The law of this Agreement is French law*". Since "*Agreement*" is a defined term, it could hence be interpreted as an express application of French law to the arbitration agreement.

The counter-argument would be that both the language of the proposed section 6A(1) and the principle of separability require that an express agreement on the law governing the arbitration clause must make express reference to the clause itself. However, such arguments, which may result in costly litigation and a period of uncertainty until the Court of Appeal or the Supreme Court decides the issue, should be avoided and are not in line with the purpose of the Bill, which is to simplify and clarify rather than complicate the law. The inclusion of the proposed subsection (2) avoids these problems.

We agree, however, that the words "*of itself*" in the proposed subsection (2) are unnecessary and may give rise to further arguments as to what considerations could lead to the conclusion that an express choice of law of the main contract is also an express choice of the law governing the arbitration agreement. We strongly recommend deleting the words "*of itself*" from section 6A(2).

Finally, we note that clause 1(3) of the Bill proposes to insert, after the opening words of section 2(2) of the Act: "*(za) section 6A (law applicable to arbitration agreement)*". Section 2(2) would, therefore, read:

> *(2) The following sections apply even if the seat of the arbitration is outside England and Wales or Northern Ireland or no seat has been designated or determined—*
>
> *(a) section 6A (law applicable to arbitration agreement) …"*

This is odd as the proposed section 6A cannot apply, certainly not in its entirety, if "*no seat has been designated or determined*". The premise of the proposed section 6A is that, for its operation, the arbitration must have a seat. If the parties have not selected a seat, one should be first designated or determined pursuant to section 3, before the proposed section 6A can be relied upon.

Therefore, instead of inserting a paragraph to section 2(2) of the Act, we would recommend adding a new subsection (6) into section 2 that could simply read: "*Section 6A applies whether or not the seat is in England, Wales or Northern Ireland*".

- **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 amendments to section 67 set out a sufficiently clear approach. In particular, the drafting makes it clear that a provision within the proposed subsection 3C applies only if the applicant is a party that took part in the arbitral proceedings. We also believe that the test of "*reasonable diligence*" is sufficiently clear and is used elsewhere in the Act, eg in section 73, and has been interpreted by the courts, eg *Westacre Investments Inc v Jugoimport-SDPR Holding Co Ltd* [2000] QB 288 (CA).

We also note that the "*interests of justice*" test in subclause 11(3)(C)(c) strikes the right balance between not allowing a re-litigation of the issues determined by the tribunal and preserving the court's power to re-hear evidence in the exceptional cases where this is truly required.

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