WRITTEN EVIDENCE FROM ALLEN & OVERY LLP TO THE CALL FOR EVIDENCE ISSUED BY THE ARBITRATION BILL SPECIAL PUBLIC BILL COMMITTEE

1. Introduction

1. Allen & Overy LLP is an international law firm with approximately 5,500 staff and over 40 offices worldwide. Our international arbitration practice advises a diverse range of clients in complex cross-border commercial and investment treaty arbitrations in many different arbitral seats around the world, typically those administered by institutions such as the LCIA, ICC and ICSID. Many of our clients are multi-nationals, from a wide range of sectors, with only a minority being exclusively UK based. Our response to this call for evidence is accordingly focused on our assessment of the needs, expectations and perspectives of commercial users of arbitration and on the factors that commercial parties take into consideration when making decisions as to their preferred forum globally for dispute resolution and when negotiating and drafting the detailed provisions of disputes clauses in their international commercial contracts.

2. As a stakeholder, we are grateful for this opportunity to respond to the call for evidence on the Bill to amend the Arbitration Act 1996 (the **Bill**). In producing this response, we have sought the views of our UK-based arbitration lawyers.

3. We have also contributed to the response to this call for evidence submitted by the City of London Law Society's arbitration committee and support the views expressed in that response.

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

4. Overall, we have a positive view of the reforms proposed in the Bill and of the comprehensive consultation and review process

undertaken by the Law Commission. We consider that the reforms will help ensure that the Act remains fit for purpose. We have commented on these proposals throughout the consultation process, through both written and oral feedback to the Law Commission. Our response to Question 3 details our views on the reforms that we consider will be particularly impactful with respect to London's status as a place for international arbitration. In our view the reforms proposed are key to ensuring that London maintains its position as a preferred seat of arbitration for commercial parties doing business internationally, in what is an increasingly competitive global market.

2. Question 2. Provisions in the Government's bill that differ from the version proposed by the Law Commission concerning:

2.1 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

5. The effect of clause 17(4) of the Bill is that the proposed amendments to the Act would apply to all arbitration agreements, save in relation to (broadly) arbitration or court proceedings which have already been commenced before enactment.

6. Whilst this provision is intended to apply to the Bill as a whole, it is particularly pertinent in relation to the amendment proposed in clause 1 of the Bill ("Law applicable to arbitration agreement"). As has been widely acknowledged, the purpose of this amendment is to do away with the effect of the UK Supreme Court's decision in *Enka v Chubb* [2020] UKSC 38. During the consultation process, the Law Commission had proposed that the new rule for determining the law applicable to an arbitration agreement would only apply prospectively to arbitration agreements entered into after the amendment comes into force. This would have preserved the effect

of *Enka* for pre-commencement arbitration agreements. This would result in two parallel rules. In our view, this would be undesirable, as observed by Lord Bellamy in the House of Lords:[1]

> "Clause 1(3) of the Law Commission version provided that the Bill would not apply to any existing arbitration agreement. That caused a certain amount of concern because there are many thousands of existing arbitration agreements going back many years and, if that situation had prevailed, we would have had a dual system for a very long time, as old arbitration agreements became subject to arbitration."

7. On the particular question of the law applicable to the arbitration agreement, we note that, just as now contemplated in clause 1 of the Bill, when the LCIA Rules were last amended in 2020, they introduced, in Article 16.4 of the Rules, a rule that the law applicable to the arbitration agreement would be the law of the seat, unless the parties agreed otherwise in writing. This amendment took effect when the LCIA Rules were amended. We are not aware of any prejudice resulting from this amendment, and so we see no reason to think that an equivalent amendment to the Act would have any prejudicial effect.

8. We agree that the exceptions in clause 17(4) are sensible. Parties must have certainty when they embark on contentious proceedings. There would be substantial risk of prejudice if parties had to deal with a change in the law on contended issues midway through proceedings.

9. We also note that the temporal application of the reforms in the Bill aligns with the approach taken under s.84 of the Act itself when it was enacted. We see no reason for a different approach to be taken now.

[1] HL Deb 19 December 2023, vol 834, col 420GC.

2.2 Extending the extent of the bill to Northern Ireland

10. We note that the Law Commission (as the Law Commission of England and Wales) is only able to make proposals and recommendations for law reform in England and Wales, which is why the Final Report was restricted to that extent.[2] As the Act extends to England, Wales and Northern Ireland, it would be logical in our view for these reforms to extend to Northern Ireland too.

3. Question 3. What impact the reforms are likely to have on the arbitration market in the United Kingdom/the City of London?

11. On balance, we think that the reforms are likely to have a positive effect on the arbitration market in the United Kingdom and the City of London.

12. There are two proposed reforms in particular that we think will improve the standing of London as a seat of arbitration internationally:

    (a) **Summary disposal (Clause 7 of the Bill)**: if implemented, this reform will mean that the UK is the first jurisdiction to provide through legislation that tribunals can summarily dispose of claims. Although we consider this to be implicit already in the tribunal's powers under the Act, our experience in practice is that tribunals are reluctant to dispose of matters on a summary basis. This can lead to unnecessarily lengthy proceedings, sometimes at significant cost to the parties involved. We expect that this reform will help provide comfort to tribunals that they may exercise the power, and therefore dispose of unmeritorious claims in a time and cost-efficient manner.

[2] Final Report, para. 1.21.

(b) **Procedural changes to jurisdictional challenges to awards (Clause 11 of the Bill)**: We discuss this clause in more detail in response to Question 5, below. In brief, we think that it is sensible to narrow the scope of the court's review under section 67 as the Law Commission has proposed; there was previously a perception among some market participants that the section 67 process could be disproportionate. We consider that the proposed reform strikes a reasonable balance, while also being flexible enough to allow the court to take a more expansive approach to evidence when justice so requires.

4. **Question 4. 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)?**

13. Clause 1 of the Bill provides:

> "(1) The Arbitration Act 1996 is amended as follows.
>
> (2) After section 6 insert—
>
> "6A Law applicable to arbitration agreement
>
> (1) The law applicable to an arbitration agreement is—
>
> (a) the law that the parties expressly agree applies to the arbitration agreement, or
>
> (b) where no such agreement is made, the law of the seat of the arbitration in question.
>
> (2) For the purposes of subsection (1), agreement between the parties that a particular law applies to an agreement of which the arbitration agreement forms a part does not, of itself, constitute express agreement that that law also applies to the arbitration agreement."
>
> (3) In section 2 (scope of application of provisions), in subsection (2) after the opening words insert—
>
> "(za) section 6A (law applicable to arbitration agreement),".

14. We support the Law Commission's proposal to change the law to a rule that, absent the express agreement of the parties to the contrary, the law of the seat will be the law applicable to the arbitration agreement. We say this while recognising the potential difficulties of the new rule. New s.6A(1)(a) will require the courts to determine whether there has been an express choice of law for the arbitration agreement. This might seem easy in theory, but it will inevitably "*raise questions as to the degree of 'explicitness' required*" and place emphasis on the "*blurred borderline between interpretation and implication*."[3] Nonetheless, a line must be drawn somewhere to avoid the difficulties raised by *Enka*. We think that in practice the courts will adopt a pragmatic and sensible approach towards determining whether an "*express*" agreement for a choice of law exists.

15. The above provides background to the criticisms levelled at the new s.6A(2) by some members of the House of Lords. Section 6A(2) clarifies that an express choice of law for the matrix contract is not, of itself, sufficient to constitute an express choice of law for the arbitration agreement. Lord Hope's view on s.6A(2) is as follows:[4]

> "The words "of itself" beg the question: what do they mean? What do they envisage as necessary to displace the default rule that, where no such agreement is made, the law to be applied is the law of the seat of the arbitration?
>
> These questions arise because it may be said that the wording of subsection (1) is perfectly clear in itself; it already uses the word "expressly". We are told there that the law applicable is "the law that the parties expressly agree applies to the arbitration agreement".
>
> What, then, does subsection (2) add to what is already provided for in subsection (1)? Indeed, do we need that provision at all? I hope that, at some point, clarity could be given as to the reasoning behind subsection (2) so

[3] A. Dickinson, *Review of the Arbitration Act 1996, Second Consultation Paper, Response to Question 1* (2023), para. 15.
[4] HL Deb 19 December 2023, vol 834, col 429GC.

> that we fully understand how it interacts with what is already set out in the clearest language in subsection (1).

16. Lord Hoffmann expressed a similar concern:[5]

> "However, I am afraid that, as I think my noble and learned friend Lord Hope pointed out, the existing new Section 6A(2), which is meant to deal with that problem, has problems of its own because of the words, "does not, of itself, constitute express agreement".
>
> If you say that, you can say, "What else is needed, and what else will count as sufficient?" You find that all you can do is to go back and say, "Well, you need an express agreement that the arbitration agreement shall be governed by a different law".

17. We disagree. The purpose of Clause 1(2) is clear. It is not immediately obvious to non-arbitration practitioners why an express choice of law for the full agreement (sometimes referred to as the 'matrix contract') would not constitute an express choice of law for the arbitration agreement. We find that, in practice, commercial parties often do expect that the governing law of matrix agreement to apply to all parts of it, including the arbitration agreement. Proposed s.6A(2) of the Act is helpful in our view in countering this misconception, because it sets out in explicit terms that a choice of law for the matrix contract is not sufficient to constitute an express choice of law for the arbitration agreement. We think that this is an important clarification for those who may not be familiar with the principle of separability, and one that warrants inclusion in the Bill. It does no damage to the requirement that any choice of law for the arbitration agreement must be "*expressly*" agreed between the parties.

18. However, we do agree that there is some difficulty with the words "*of itself*". These words have the potential to confuse matters,

[5] HL Deb 19 December 2023, vol 834, col 433GC.

because they imply that in certain circumstances a choice of law for the matrix contract, when paired with other relevant factors, may be enough to constitute an express choice of law for the arbitration agreement. The current drafting risks preserving some of the uncertainty imposed on the law by *Enka*, which is exactly what the new legislation was designed to avoid. In our view therefore, to retain the conceptual clarity created by s.6A(1), the words "*of itself*" should be dropped from the proposed s.6A(2).

19. **Question 5. Whether the amendment to section 67 of the Arbitration Act 1996 relating to challenges to substantive jurisdiction) set[s] out a sufficiently clear approach?**

20. In our view, the amendments to s.67 of the Act (as set out in Clauses 10 and 11 of the Bill) are sufficiently clear.

21. Clause 10 of the Bill would amend s.67 to ensure consistency of approach to the remedies available across sections 67 to 69 of the Act. We agree with the Law Commission that "*these additional remedies would be useful under section 67 just as they are useful under sections 68 and 69*."[6]

22. As for Clause 11, we agree with Lords Verdirame and Mance in the House of Lords that Clause 11 does more than provide that (as Lord Bellamy put it) "*the challenge* [to jurisdiction] *should not be* [a] *de novo* [review]".[7] The Law Commission's proposal was more nuanced. As we discuss in our response to Question 3, we consider that the reforms proposed with respect to jurisdictional challenges are, on balance, positive, and reflect a sensible compromise between different schools of thought in the responses to the Law Commission's consultation.

[6] Final Report, para. 9.143.
[7] HL Deb 19 December 2023, vol 834, col 434GC; HL Deb 19 December 2023, vol 834, col 427GC.

23. We also agree with Lord Mance that "[i]*t is wrong for a tribunal's analysis of its own jurisdiction to be axiomatically final*."[8] In our view, the rules of court that may be made under Clause 11(3C) should provide the court with the means to effectively supervise an arbitral tribunal's ability to determine the limits of its own jurisdiction, whilst still acting as a practical restriction on the rehearing of evidence. By providing that these controls should be implemented through rules of court, the courts are afforded a certain degree of flexibility when applying the new criteria. In this respect, Clause 11 strikes the correct balance.

24. Clause 11 may lead to little change in practice in most cases. Parties are already precluded by s.73 of the Act from putting forward new objections when making a s.67 challenge. Parties to a challenge tend to rely on the evidence put forward in the arbitration and, if they seek to introduce new evidence, the court already has the power to control their ability to do so. Nevertheless, it is sensible for the sake of predictability to set out these limitations, and helpful for fine-tuning the limitations in the future for them to be set out in court rules rather than the Act itself.

6 February 2024

[8] HL Deb 19 December 2023, vol 834, col 434GC.