WRITTEN EVIDENCE FROM TOBY LANDAU KC MA, BCL (Oxon), LL.M. (Harvard), FCIArb, CArb

SUBMISSION OF EVIDENCE

TO THE HOUSE OF LORDS SPECIAL PUBLIC BILL COMMITTEE

ON THE ARBITRATION BILL

A. PERSONAL BACKGROUND

1. I am a barrister and arbitrator, and a member of the Bars of England & Wales, Singapore, New York, the BVI and Northern Ireland, and registered in the DIFC. I have been in practice for 30 years, and am currently a sole practitioner in London and a member of Duxton Hill Chambers in Singapore.

2. I was closely involved in the formulation and drafting of the Arbitration Act 1996. I was appointed in 1993 to advise and assist the Departmental Advisory Committee (DAC) on what was then a troubled and widely disliked draft Bill. From 1993 to 1996, I worked closely with Lord Saville and Parliamentary Counsel Geoffrey Sellars to produce an entirely new Bill, which was then enacted. I also assisted Lord Saville in drafting the February 1996 and January 1997 DAC Reports on the Arbitration Act, and worked on the new Rules of Court that were promulgated alongside the new legislation.

3. As Counsel, I specialise in international commercial, investor-State and inter-state arbitration, and have argued many of the leading cases in these fields in the highest courts of England, Singapore, Hong Kong, Pakistan and the Caribbean. In particular, and relevantly for present purposes, I acted as counsel in the UK Supreme Court in *Dallah v Pakistan* (leading case on s.67 of the Arbitration 1996); *Enka v Chubb* (leading case on the law governing the arbitration

agreement); and *Halliburton v Chubb* (leading case on arbitrators' duty of disclosure).

4. As Arbitrator, I have extensive experience as Chairman, Co-Arbitrator and Sole Arbitrator in commercial and investor-State disputes under most of the world's leading *ad hoc* and institutional rules. I am a member of numerous panels, including ICSID. In 2020, I was appointed as one of 25 persons to serve on the Arbitration Panel under the Agreement on the Withdrawal of the United Kingdom from the European Union and the European Atomic Energy Community.

5. I am a Visiting Professor (Arbitration law) at Kings College London; Vice-President of the SIAC Court of Arbitration; Member of the Governing Board of ICCA; Fellow (and previously Trustee) of the CIArb and Chartered Arbitrator; Vice-Chairman of the Saudi Centre for Commercial Arbitration; previously UK delegate to the UNCITRAL Working Group on Arbitration (1994 to 2013); previously Director and Court member of the LCIA; previously board member of the SCC; and a draftsman of the Pakistan Arbitration (International Investment Disputes) Ordinance 2006, the Mauritius International Arbitration Act 2008, the Pakistan Trade Disputes Resolution Act 2023, as well as many institutional arbitration rules.

6. I have a first-class law degree and a first class BCL from Oxford University (Eldon Scholar), and an LL.M. from Harvard Law School (Kennedy Scholar).

B. CALL FOR EVIDENCE QUESTION 1:

WHETHER YOU AGREE WITH THE PROPOSED REFORMS AND WHETHER THE REFORMS ACHIEVE WHAT THEY ARE INTENDED TO.

7. The Law Commission set out to ensure that the Arbitration Act 1996 remains state-of-the-art legislation, in line with prevailing international practices and expectations, and able to maintain this jurisdiction's position as one of the world's leading international arbitration centres. In my view, the Law Commission has clearly succeeded in this task. It has done the most thorough analysis and consultation on what is now a 25-year-old Act with substantial associated case law. It has compared the Act with developments across the globe, and in particular the regimes in our principal competitor jurisdictions. And it has taken into account a wide array of views from all key stakeholders. The result is a relatively short but highly focused Bill which in my view strikes the perfect balance between making changes that are really required, and avoiding changes that are unnecessary or may undermine what is still one of the most respected arbitration laws worldwide.

8. To this end, there are no provisions in the Bill (as now before this Committee) with which I disagree, and no provisions I would wish to see added.

C. CALL FOR EVIDENCE QUESTION 2:

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

9. I agree with this change. This issue has been thoroughly addressed in a detailed note to the Law Commission dated 26 September 2023 produced by leading judges and practitioners from Brick Court Chambers, 7 King's Bench Walk, 20 Essex Street and Essex Court Chambers, and I gratefully borrow from that note in my comments.

10. The change concerns the new provision on the law governing the arbitration agreement. Section 6A(3), as set out in clause 1(2) of the Law Commission's Bill, provided that the new default rule on this issue in the new section 6A(1) would only apply to: "*arbitration agreements entered into [after] the day on which section 1 of the [new] Arbitration Act 2023 comes into force*".

11. Although not articulated in the Law Commission's reports, it is assumed that this was motivated by a concern to avoid retroactive changes to agreements that have already been concluded. In particular, the thought is likely to have been that in concluding contracts, parties may have taken into account *Enka v Chubb*, and so their bargains ought not to be disturbed by subsequent legislation.

12. This concern about retroactivity and the preservation of concluded bargains has a long history in arbitration law reform. The consistent solution has been (a) to ensure that changes in legislation do not have any impact on arbitration proceedings that have already commenced as of the date the new law comes into effect; but equally (b) to ensure that the new law otherwise applies to all existing arbitration agreements, where proceedings have not yet commenced. In this way, proceedings that are actually underway are allowed to continue unaffected (as otherwise they could be seriously undermined). But at the same time, all arbitration agreements that have not yet led to actual proceedings have the benefit of the changes in question. Arbitration agreements can be in existence for many years before being triggered when a dispute arises, and so this solution avoids the complexity of running parallel legal regimes at the same time (an "old" and a "new" arbitration law).

13. This solution can be seen, for example, in the transitional provisions of:

    i. the Arbitration Act 1889;

    ii. the Arbitration Act 1934;

    iii. the Arbitration Act 1996 (s.84);

    iv. the Arbitration (Scotland) Act 2010 (s.36).

14. It is true that overriding the result in *Enka v Chubb* represents a substantive and significant change, with a concrete impact on existing contracts, and so (technically) vested rights. But this is a change in many ways equal or less significant than, for example, the wholesale reform of almost all aspects of English arbitration law that Part 1 of the 1996 Act brought about – with retroactive effect. In particular, similar to some of the provisions of the Bill, Part 1 of the 1996 Act contained substantive provisions regarding the nature and character of arbitration agreements (e.g. s.6 on writing; s.7 on separability; s.8 on the effect of death). These provisions changed vested rights – and yet all of them were applied to existing arbitration agreements without any concern.

15. Indeed, it may be noted that *Enka v Chubb* actually introduced a lack of clarity, rather than a clear rule, hence the need for the Bill to correct it. This was emphasised in terms by the Law Commission in Para. 1.138 of its Final Report Summary. On this view, it is harder to contend that parties will have specifically relied upon this decision when concluding their agreements.

16. I see no reason here to depart from the established approach to retroactivity. There is nothing in the nature of the changes that the Bill will make that requires this. On the contrary, to make such a departure will inevitably build complications into English arbitration law, with two parallel regimes co-existing, and the likelihood of

satellite litigation on transitional issues. This would undermine the goals of the overall Bill. Indeed, given the established legislative practice on transitional provisions (now going back more than 130 years), there is a strong case to suggest that in concluding arbitration agreements subject to English law, parties must be taken to have agreed to English law as it happens to be whenever an arbitration proceeding is commenced.

D. CALL FOR EVIDENCE QUESTION 3:

EXTENDING THE EXTENT OF THE BILL TO NORTHERN IRELAND

17. I agree with this proposal. This is consistent with section 2(1) of the 1996 Act. Given that the Bill is updating an Act that itself extends to Northern Ireland, there is no basis to provide for a different territorial scope.

E. CALL FOR EVIDENCE QUESTION 4:

WHAT IMPACT THE REFORMS ARE LIKELY TO HAVE ON THE ARBITRATION MARKET IN THE UNITED KINGDOM/THE CITY OF LONDON

18. London remains one of the world's most popular and trusted arbitral seats. But there are many serious competitors, including Singapore, Paris, Geneva, Stockholm, and Dubai, as well as The Hague and Washington (for investor-State cases). And many emerging arbitration centres that may pose a competitive threat in years to come (such as Abu Dhabi, Riyadh, Kuala Lumpur, Beijing, etc). Many of these centres regularly update their arbitration laws to ensure that they reflect prevailing requirements.

19. London has maintained its prime position by reason of a number of factors, including: (a) the 1996 Act, which has remained a recognised gold standard for arbitration legislation; (b) the quality of the English Commercial and higher courts; (c) the quality of the English legal profession; (d) confidence in English commercial law; (e) dispute resolution facilities in London; and (f) historical trust.

20. The Bill is vitally important in maintaining factor (a) above. The 1996 Act is now 25 years old – older than many arbitration laws in place in competitor seats. And whilst, in truth, it is in need of only minor updating, passing an "Arbitration Act 2024" sends an extremely important message to the arbitral world that the Act has been reviewed and upgraded, and remains a gold standard. In my view, it is this factor alone, rather than the actual detail of the provisions, that will have the greatest impact in maintaining London's position.

21. But even beyond this "big picture" point, the individual provisions will in my view be very well received by users, and seen as attractive features of London arbitration.

22. London's position as an arbitral seat in the long term, however, will depend on factors (b) to (f) identified above, for which the Bill will have no impact.

F. CALL FOR EVIDENCE QUESTION 5:

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]?

23. Section 6(A), as set out in Clause 1(2) of the Bill, may be broken down as follows:

    i. **Section 6A(1)(a)** allows for parties to make an express choice of the governing law for their arbitration agreement. This is perfectly clear in my view.

    ii. **Section 6A(1)(b)** provides the new default rule: if there is no express choice, then the governing law shall be that of the seat. This is also perfectly clear in my view.

    iii. **Section 6A(2)** provides that if the parties expressly agree on a choice of law for a contract in which there is an arbitration agreement (the "matrix contract"), that will not – in and of itself – qualify as an express choice for the purposes of Section 6A(1)(a). In other words, this will not displace the default rule.

    This provision is required to forestall the obvious argument that an express choice of law for the matrix contract necessarily includes – implicitly – an express choice of law for the arbitration agreement contained therein.

24. The complexity in the drafting of this provision comes from item iii., and in particular the phrase "*of itself*".

25. In my view, this phrase is not required and should be deleted.

26. The phrase was no doubt intended to convey that *simply* including an express choice of law for the matrix contract is not sufficient. But on one reading the phrase suggests that whereas an express choice of law for the matrix contract does not "*of itself*" count as an express choice for the arbitration agreement, it might if there is something

more. But the only thing more which could conceivably count would be an express choice of law for the arbitration agreement itself. Absent this, the default rule must apply.

27. In other words, either there is an express choice of law for the arbitration agreement, or there is not. Whether there is an express choice of law for the matrix contract is neither here nor there.

28. Deleting the phrase "*of itself*" will, in my view, render Section 6A(2) clearer.

29. I note that the new Section 6A does not provide guidance as to what is required to constitute an express choice of law to govern the arbitration agreement. As to this:

    i. Some commentators have proposed that the choice should be contained in the arbitration agreement itself, and that wording along the following lines be used:

    > "... *unless the parties expressly agree otherwise in the arbitration agreement itself*".

    In my view this is problematic. It is unclear why an express choice will only be respected and enforced if it is contained in the arbitration agreement itself, as opposed to another provision. What if (e.g.) Clause 3 of a contract is headed "*Governing Law*" and provides expressly that the arbitration agreement shall be governed by French law, and Clause 10 of the contract is headed "*Arbitration*" and makes no mention of governing law? Why should the parties' express choice of law be invalid in such a case? The critical factor is that only an express choice will suffice (to avoid all the existing complications of implied choice), but the positioning of the

express choice in a contract is surely irrelevant. Indeed, invalidating an express choice of law simply because of its location in a contract would likely be damaging to England as an international seat.

ii. Some commentators have suggested that the provision include wording such as:

> "*An express choice of law in, specifically relating to, or referencing the arbitration agreement is an express choice for the purposes of subsection (1)*".

This would be a workable option.

30. On balance, I consider that the notion of an express choice of law to govern the arbitration agreement is sufficiently clear in itself and needs no further elaboration. No doubt it is a concept that will be developed as needed by the Courts.

G. CALL FOR EVIDENCE QUESTION 6:

WHETHER THE AMENDMENT TO SECTION 67 OF THE ARBITRATION ACT 1996 (RELATING TO CHALLENGES TO SUBSTANTIVE JURISDICTION) SETS OUT A SUFFICIENTLY CLEAR APPROACH?

31. In my view it does.

32. As explained in the Law Commission reports, clause 11 of the Bill is a compromise following an earlier proposal to change the nature of section 67 of the 1996 Act from a mechanism that allows for "*de novo*" review to some kind of appeal.

33. Removing "*de novo*" review from section 67 – in my view – would have done fundamental damage to English law, rendering it out of line with most respected and trusted arbitration regimes. The

fundamental principle at stake here is *kompetenz-kompetenz*, by which a tribunal is entitled to rule on its own jurisdiction in the first instance. In short, it is given chronological priority in this regard. But it is well established that the tribunal simply cannot have the final say on its own jurisdiction - because it cannot pull itself up by its own bootstraps. If in fact the purported tribunal is not a tribunal at all, there is no part of its decision whatsoever that is valid. And so a *de novo* hearing must be available in all cases.

34. Further, restricting section 67 to a mere appeal would mean that the Court would be disabled from a full review whenever, in the unquestioned exercise of its procedural discretion, a tribunal excluded certain evidence before deciding on its jurisdiction. In that (common) case, a Court would be confined by that decision. It would have no basis to second-guess the procedural discretion, and would be unable to consider the excluded evidence when assessing jurisdiction. But if - in fact - the tribunal is not a legitimate tribunal, this would be indefensible.

35. The call for reform here has been driven by, and focused on, cases where a tribunal is the legitimate tribunal, and costs are needlessly expended on a full re-hearing in Court of a process that has already taken place before the tribunal. This concern is best addressed by case management rules that allow a Court to consider each case, and to decide whether a full re-hearing is actually required in all the circumstances, or whether limits should be imposed upon the grounds argued and the materials presented.

36. In my view clause 11 of the Bill encapsulates well the kinds of issues that rules of court should implement in this regard, whilst leaving the precise implementation to the discretion of rules committees, who no

doubt may adjust their guidance over time. Nothing more specific, in my view, is required here.

TOBY LANDAU KC

7 FEBRUARY 2024