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Submitted to Law Commission second consultation on the Arbitration Act 1996
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About you

What is your name?

Name:
Michael Davison

What is the name of your organisation?

Enter the name of your organisation:

CLLS Arbitration Committee

Are you responding to this consultation in a personal capacity or on behalf of your organisation?

Response on behalf of organisation

If other, please state::

What is your email address?

Email:
michael.davison@hoganlovells.com

What is your telephone number?

Telephone number:
+442072962193

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Tell us why you regard the information as confidential:

Proper law

Consultation Question 1

Yes

Please give your reasons::

Subject to what follows : our answer is “yes”.

In setting out our response to this question, it is useful to repeat some of the guiding principles that framed our first response : (i) the Act should be a self-contained code with references to other sources being strictly limited; (ii)the Act should seek to be as clear as possible to users of the process, particularly those who are located outside England and Wales; and (iii)it should seek to make England an attractive forum for users of arbitration.

Applying those principles to this second consultation leads us to repeat our previous view that the law of the arbitration agreement should be stated to be the law of the seat, unless the parties agree otherwise. The Committee considers that without this amendment to the Act, it is likely that some arbitrations seated in England will become subject to considerable uncertainty in important areas such as the separability of the arbitration agreement and the arbitrability of the dispute.

The Committee has reflected on the wisdom of the using the word “expressly” as proposed.

It was felt that the word “expressly” risked opening up the provision to challenge unnecessarily.

In other words, the parties have either agreed to another law, or they have not. The Committee felt that the word “expressly” only served to confuse rather than clarify.

Further, since parties can agree the governing law of the arbitration agreement outside of the arbitration agreement, the Committee felt that the words “in the arbitration agreement itself” are too restrictive and that the rule should be silent as to where the agreement is made.

To take account of our above points, the Committee recommends modifying the proposed new rule to read: “the law of the arbitration agreement is the law of the seat, unless the parties agree that another law should apply.”

Section 67

Consultation Question 2

Other

Please give your reasons::

In its response to the first consultation paper, the Committee agreed with the Commission’s proposals regarding proposed reform of section 67 of the Act, while noting a strongly-felt minority view in favour of retaining the current approach of a de novo rehearing by the court of the tribunal decision on jurisdiction, with judges exercising case management powers to address inappropriate use of the challenge mechanism.

The Committee agrees broadly with the Commission’s alternative proposal set out in the second consultation paper.

Overall, the Committee considers the proposed approach strikes an appropriate balance between retaining a high level of court oversight of arbitral jurisdiction, while addressing concerns regarding the time and costs impact in certain cases of second “bites of the cherry” in section 67 challenges.

Nevertheless, the Committee does not agree that evidence should be reheard only “exceptionally in the interests of justice”. The Committee considers that this sets a too high and too uncertain hurdle for parties. We suggest that evidence may be reheard where it is “necessary in the interests of justice”, i.e., that the requirement for exceptionality be removed.

Consultation Question 3

No

Please give your reasons::

On balance, the Committee disagrees with the proposal in the sense that the majority of the Committee is in favour of the proposals in CQ2 being enshrined directly in the Arbitration Act itself. This would be most helpful for international users and is consistent with the principle that the Act should be a self-contained code with only limited reference to external sources.

However, a minority of the Committee take the view that it may be prudent to deal with the court’s case management of section 67 cases in court rules, avoiding the potential need to make further amendments to the Act.

Discrimination

Consultation Question 4

Yes

Please give your reasons::

Yes, we do.

Consultation Question 5

Other

Please give your reasons::

The Committee considers that the imperative of fostering diversity and countering discrimination in international arbitration is best supported through professional codes of conduct (such as the requirement under SRA Principle 6 upon all English solicitors to "encourage diversity, equality and inclusion"), as well as global initiatives such as the "Equal Representation in Arbitration Pledge" (which is supported by almost all the London law firms practising in this area), the “African Promise” and the “Racial Equality for Arbitration Lawyers" Initiative.

Our focus is on the perspective of international parties, who are key users of the Act. Our collective experience of acting for international parties from a broad cultural and geographic spectrum in international arbitration indicates that the proposals for countering discrimination reflected in the Law Commission's proposals may well end up doing more harm than good, in generating satellite disputes and ammunition for "guerrilla tactics" aimed at disrupting the arbitral process and overturning awards, whilst having little real influence on core issues such as appointment decisions. If adopted, these proposals may well diminish London’s attractiveness as a seat of arbitration. The behavioural and cultural change that is still sorely needed will most effectively be fostered by initiatives within the arbitral community, the arbitral institutions and the relevant professional bodies, not through primary legislation. That is not to say the end goals are not of the utmost importance (they clearly are), merely that primary legislation is not the optimal path to achieving them.

A series of questions and uncertainty arise as to what test might be applied to determine whether there has been discrimination, who should determine whether there has been discrimination and what the consequences should be. Such uncertainties would serve to encourage the "guerrilla tactics" that we are concerned about.

Consultation Question 6

Please give your answer::

See response to question 5.