**CLLS Arbitration Committee's written submissions to the Special Public Bill Committee on the Arbitration Bill**

**6 February 2024**

Introduction

The Special Public Bill Committee on the Arbitration Bill has asked for the Arbitration Committee of the City of London Law Society (CLLS) to provide written and oral submissions in relation to the Arbitration Bill.

This submission reflects the views of the CLLS Arbitration Committee. The CLLS represents approximately 17,000 City lawyers through individual and corporate membership, including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues. The CLLS Arbitration Committee ("**Committee**") is made up of senior and specialist lawyers from over a dozen international law firms who have a particular focus on issues relating to arbitration and settlement of cases, and in supporting the role of London as one of the leading centres for arbitration in the world.

The Call for Evidence welcomes our views on six particular points, which we address below.

Likely impact of reforms on London/UK arbitration market

We begin with this commercial point as this is where our Committee's expertise lies; our perspective is a broad one; the arbitration teams in our firms practise in the major arbitral centres globally, under a variety of curial and governing laws. We have first-hand experience of the advantages and disadvantages (both perceived and real) of different seats and curial laws, and of the process of engaging with clients and colleagues in choosing an arbitral seat. As arbitration practitioners based in London, we are conscious of the significant advantages that London has but, as members of global teams in international firms, we are also conscious of the degree of competition London faces, and some of the disadvantages it suffers from. We have a significant amount to say on the topic of the likely impact of reforms on the choice of London as a seat but will confine these submissions to a few key points. However, we would very much welcome the opportunity to discuss and expand on these (and additional) points by way of oral evidence before the Special Public Bill Committee.

The arbitration market is an extremely competitive one and amongst the most global of markets in legal services. While London has consistently been a top-ranked arbitral seat, we must keep apace with international arbitration developments and continue to promote and develop London arbitration so that it does not "lose" its pre-eminent ranking to other important arbitral seats such as Singapore, Paris, New York, Stockholm, Hong Kong, Dubai and Geneva, many of which have been vigorously marketing their arbitration services in recent years and increasing in popularity as a result.

Modernising the curial law will be crucial to ensuring that London (and England Wales and Northern Ireland more broadly) continues to be, and is seen to be, a fair, open, efficient, innovative, transparent and effective place to arbitrate. Overall, subject to the minor proposed refinements to the draft law made in these submissions (*headline points are in red text for ease of reference*), we consider that the current draft Arbitration Bill will achieve those goals and improve the competitiveness of London as a seat of international arbitration. We are content that the Bill largely reflects the Committee's views on the key areas for reform as set out in our

first and second responses to the Law Commission's Consultation Papers. The very extensive (and energetic) consultation process undertaken by the Law Commission has performed an invaluable service not just in informing the process of reform of statute but also focusing the attention of London practitioners on the need actively to promote London as a place to arbitrate.

An up-to-date, state of the art arbitration law is only one aspect of what is needed for London to continue to attract international (and local) users to arbitrate in London, and elsewhere in the UK. The added commercial challenges in promoting London also merit proper consideration and we are well-placed to help UK Parliament and Government address these challenges.

We note that choices of arbitral seat are, in our experience, only partially influenced by legal considerations. Also significant for London are real and perceived difficulties in securing visas and relative costs of travel and accommodation. Committee members have all too much experience of clients, witnesses and even arbitrators finding the process of obtaining UK visas slow, expensive and inefficient. Because many users of international arbitration are from developing economies this is a particular challenge in arbitration. Obtaining UK visas from many developing economies seems to have become significantly more difficult in recent years. All too often it is simply easier for meetings and even hearings to take place in other international centres.

Confidentiality – a missed opportunity

The Committee consider that the Arbitration Act should be improved by directly addressing confidentiality, a hallmark of the arbitration process in England and Wales. The Law Commission considered, but rejected, a statutory rule on confidentiality in their draft Arbitration Bill, concluding that it would not be "*sufficiently comprehensive, nuanced or future-proof*."

In the Committee's experience, confidentiality, along with neutral venue, is a prime reason for international commercial parties choosing to arbitrate rather than litigate. English law on confidentiality is amongst the strictest of the major curial laws and widespread exposure to English jurisdiction means comparatively better chances of enforcing confidentiality requirements. But this comparative advantage for London is an unnecessarily difficult "sell" when statute law is silent on the issue. Potential users of a London seat cannot be expected to trawl the arbitration textbooks in order to appreciate what the English law position is on confidentiality. It must also be noted that those advising on the choice of an arbitral seat may often not be specialist arbitration lawyers and commonly will not be English law qualified or based in England.

The historic reasons for the 1996 Act not addressing confidentiality are well known but the world of arbitration has changed significantly since then and become greatly more competitive and international. Now we have the opportunity to improve the Act and, mindful that the 2024 Act will influence international users' perception of London arbitration for many years, we find it untenable that the Act will remain silent on such an important element of arbitration in this jurisdiction – and an element which, in our experience, represents a significant advantage for London over a number of competitor seats. For these reasons, the Committee feels it is imperative that our arbitration law provides *guidance* for users on such a key area.

We respectfully disagree with the Law Commission that the law of confidentiality should be left solely for development by the courts particularly when, during this reform process, other areas previously left to the courts - such as arbitrators' duties of disclosure and determining the law governing the arbitration agreement – are being codified in the 2024 Act. We are concerned

that the extent to which confidentiality is a positive reason for international parties to choose London as a seat in preference to certain others may not have been fully appreciated.

The Committee believes consistency is important in this regard and it considers that, *at a minimum*, the 2024 Act should contain a statement of principle as to arbitrations being confidential under the law of England, Wales and Northern Ireland. It could also acknowledge that there are exceptions to the general principle (some of which are enshrined in arbitral rules so parties' consent to those exceptions to the extent that they agree to those arbitral rules governing their arbitration) and that parties may agree to override confidentiality.

Bryan Cave Leighton Paisner's 2022 Survey on "*The Reform of The Arbitration Act 1996*" ("**Survey**") demonstrates that the Committee's proposal (above) accords with the expectations of international users since an overwhelming majority, 83%, of respondents favoured either full codification of the duty of confidentiality or embedding a general principle of confidentiality in the Act. The Survey, which counted 116 respondents from around the globe, is available here.

Turning now to the other legal points on which you have sought the Committee's view.

Law governing the arbitration agreement

Two primary points arise:

1. Whether clause 1(2) of the Bill (adding new Section 6A to the Arbitration Act) is sufficiently clear in its drafting.

2. Our view on the Government's amendment which provides that these changes to the law apply to all arbitration agreements ("**AA**") *whenever made* except those where arbitrations have already commenced (including court proceedings in connection with pre-commencement arbitral proceedings or an award made in such proceedings).

**Clause 1(2) drafting**: this seems clear to the Committee. The Committee acknowledged the House of Lords' debate on 19 December on this issue and discussed section 6A(2). On balance we agree that section 6A(2) is helpful and should be retained primarily because: (i) many users may not be aware of the notion of separability of the AA and that AAs may have a different governing law to that of the underlying matrix contract so when they read section 6A(1)(a) they may wrongly assume that a governing law clause in a contract will automatically amount to an express choice of the AA too; and (ii) arbitration users and courts have, by virtue of ***Enka v Chubb***, been accustomed (for years now) to an express choice of the law governing the underlying contract generally applying to its arbitration agreement so, despite the new statutory default rule, ambiguity could still remain. We therefore foresee that the English court may well need to use section 6A(2). However, we agree with some of the Law Lords that the words "of itself" in section 6A(2) potentially add more confusion than assistance. We therefore think that deleting the words "of itself" in section 6A(2) would make that section clearer.

**Temporal application**: the Committee considers that the Government's amended version of the Bill (deleting prior section 6A(3) and adding new section 17(4)) deals effectively with the practical issue of having two "regimes" on governing law (common law and the new regime under the 2024 Act). Since more arbitration agreements will fall within the new regime by virtue of the proposed change, this promotes legal certainty.

Extending the Act to Northern Ireland

The Committee agrees with the 2024 Act being extended to Northern Ireland. Given that the 1996 Act applies to Northern Ireland (save for very minor exceptions unimpacted by the proposed reforms) it makes sense for the 2024 Act to have the same geographical coverage as its predecessor (from a policy and practical standpoint).

Amendments to Section 67 of the Act

We consider the proposed amended wording to section 67 is sufficiently clear to enable the courts to make appropriate rules of procedure implementing the proposed changes. As noted in our reply to the Law Commission's Second Consultation Paper ("***Second Reply***"), the revised 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.

In our Second Reply, the Committee proposed that evidence should only be reheard where it is "necessary in the interests of justice", (i.e., we sought to get rid of the Law Commission's proposed requirement for *exceptionality*). We are, therefore, content to see that this precise wording has now been adopted in the latest Arbitration Bill and remain strongly of the view that this language should be retained. It provides our supervisory courts with the flexibility it needs in this area of law.

Amending Section 39 of the Act

As a final comment, the Committee thinks that section 39 of the Act could be improved by expanding all references to "orders" in that section to also include "provisional awards" to take account of recent case law (YDU v SAB and BYH [2022] EWHC 3304 (Comm) showing the courts' acceptance of provisional awards[1]. In that case, the High Court held that an order for specific performance (which was subject to conditions) contained in a Partial Final LCIA Award could be regarded as a "provisional award" under section 39 and would remain subject to the tribunal's final adjudication pursuant to section 39(3).

We note that the Law Commission briefly considered section 39 in its First Consultation Paper, but it did not have the benefit of the above case law which was handed down after the issuance of that paper.

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Thank you for considering our submissions. The Committee looks forward to the opportunity to discuss these further, in person, with the Special Public Bill Committee in February.

[1] The court acknowledged that "*there has been little authoritative consideration of provisional awards under s. 39. It is clear from its heading that s. 39 envisages that orders made on a provisional basis may be 'provisional awards'. In my judgment if there is a provisional award under this section, then it is an award for the purposes of the 1996 Act, and, for example, ss. 67-69 will apply to such an award. I do not see why the relevant paragraphs [in the Partial Final Award] cannot be regarded as provisional awards within the meaning of s. 39. They decided on what the position should be, but that was subject to modification, and to the tribunal's final adjudication*." The court went on to say that since the relevant paragraphs [in the Partial Final Award] constituted an award within the meaning of the 1996 Act, they counted as final and binding for the purposes of section 58 even though they were susceptible to alteration by the tribunal in particular circumstances. In response to the Claimant's argument that if the tribunal "*makes an award, it cannot revisit it*", the court held that it is "*too dogmatic and absolutist a position to say that something which is 'an award' can never be revisited*."