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Submission in response to the Law Commission's review of the Arbitration Act 1996

Introduction

The Chartered Institute of Arbitrators (Ciarb) is an international centre of excellence for the practice and professional standards of alternative dispute resolution. With its headquarters located in London, Ciarb represents, unites, and supports its members across the world.

Ciarb's policy is to interact with and contribute to the developments in the dispute resolution arena to the benefit of its 18,000 strong global membership. We therefore submit this Response to the English Arbitration Act 1996 Review Reform, conducted by the Law Commission of England and Wales.

Background

The English Arbitration Act is a uniquely successful piece of legislation. Adopted in 1996, it has offered a comprehensive legal foundation for domestic and international arbitrations and has become the main driving force behind London becoming one of the most successful and popular of all international arbitration hubs globally. The development of dispute resolution and arbitration practice locally and internationally has prompted a discussion on whether the Act could benefit from the modification of some of its provisions.

Shortly after the Act's 25th anniversary in 2021, the Law Commission ("the Commission") issued its Consultation Paper 257 "Review of the Arbitration Act 1996" evaluating the Act's effectiveness and fitness for purpose in the coming decades. The paper analyses several provisions of the Act and offers proposals for some changes based on in-depth technical, legal, and practical analysis. Since the start of the review, the Commission has welcomed and participated in discussions on the review with other stakeholders in the industry, including practitioners, international dispute resolution institutions and organisations. Ciarb has actively contributed to and organised many of those discussions, such as the review of the Reform by the Alternative Dispute Resolution All-Party Parliamentary Group (ADR APPG) and a Public Consultation event with the Commission at Ciarb's headquarters.

Ciarb now submits this, its recommendations on the proposals presented by the Commission in the review. This submission was prepared in consultation with and in consideration of views provided by the following individuals: Ben Giaretta, Louis Flannery KC, David Steward, Toby Landau KC, Wendy Miles KC, Marion Smith KC, Jonathan Wood, Duncan Bagshaw, Clare Ambrose, Ali Malek KC, Professor Stavros Brekoulakis, Christopher Harris KC, Paul Bonner Hughes, Professor Julian Lew KC, Professor Emilia Onyema, James Clanchy, Audley Sheppard, Carlos Carvalho, Sir Bernard Eder, Andrew Miller KC, and Rt. Hon. Lord Jonathan Mance. This submission should in no way be

construed as reflecting, agreeing, or disagreeing with any of the personal views expressed by the above individuals and is entirely the views of Ciarb alone.

Item 1. Summary Disposal

Summary disposal. Perhaps provide expressly (in section 34(2)) that procedural matters include whether, after giving the parties a reasonable opportunity to put their case, to proceed summarily to an order or award on any issue.

Summary disposal of issues which lack merit

In the Commission's view, it might be reasonable to adopt an express, non-mandatory provision allowing summary disposal procedures. Even though such procedures are not currently prohibited, an express provision might make arbitrators less reluctant to resort to it.

Recommendation: Support proposal

Summary disposal can be used effectively to save considerable time and cost for parties. As was noted by commentators, the implied authority to do this is available via section 33 of the Act. However, arbitrators have been reluctant to use this power. This could be attributed to due process paranoia, or it could be a general lack of familiarity with summary disposal procedural mechanisms. An express provision in section 34(2) may well give confidence to arbitrators to adopt such procedures in suitable cases, to the benefit of the parties.

The resulting express provision should be non-mandatory and should be drafted to maintain the fundamental principle of party autonomy in the law of England, Wales, and Northern Ireland. Summary disposal should be available only upon the request of one of the parties and should not be within the discretion of the arbitrator. Summary disposal should also be limited to the substantive claims in the dispute. Parties should retain the power to exclude summary disposal via preliminary agreement.

Item 2. Emergency Arbitrators

Emergency arbitrators. Give them status, perhaps by including them in the definition of arbitrator or tribunal (in section 82(1)). Consider how section 44 (court powers in support of arbitral proceedings) might be exercised where emergency arbitration procedures are also available.

Emergency Arbitrators

The provisional conclusion of the Commission is that the provisions of the Act should not apply generally to emergency arbitrators. As an example, it believes that section 16 (procedure for appointment of arbitrators) is not suited to the appointment of emergency arbitrators. However, the question remains as to what happens if an emergency arbitrator issues an interim order which a party ignores and how the Act could address this.

Recommendation: Support the first option proposed by the Commission.

Emergency arbitration is a development stemming from the practices of arbitral institutions and is used as an alternative for seeking interim measures from courts. It can be a vital option for parties

in disputes seated either in jurisdictions where interim measures are not available from the courts, or in jurisdictions where the parties (for whatever reason) do not want to make an application to the courts. This should be an effective remedy. There is also a concern about whether, under the interpretations of the law of England, Wales, and Northern Ireland, it is necessary to specify in the Act that agreeing to institutional rules which allow for emergency arbitration does not prevent parties from also seeking the assistance of the courts. We believe that, of the options presented, this is best addressed through an express empowerment of the court to order compliance with a peremptory order of an emergency arbitrator. This would forestall any attempts by parties to argue to the contrary and would be in line with other sections of the Act which give the same empowerment concerning orders of a regularly constituted tribunal.

Should this option be taken, and emergency arbitrators be given status in the Act, it would also be necessary to clarify whether awards in emergency arbitration are enforceable under section 66 or whether they are peremptory orders as defined in section 42: we favour the latter, since this would be consistent with the interim measures of a tribunal and would avoid the application of the provisions of the Act and caselaw applicable to awards (which could have unwanted consequences, undermining the effectiveness of emergency arbitration).

Item 3. Court Powers Exercisable in Support of Arbitral Proceedings

Provide that section 44 can be used against third parties. Allow affected third parties a right to petition the Court of Appeal.

Interim measures ordered by the court in support of arbitral proceedings (section 44 of the Act)

The Commission asks whether an explicit provision confirming the powers of the courts to make orders under section 44 against third parties is needed. The paper offers several other proposals regarding measures such as emergency arbitrators and the relevant provisions of the Act.

Recommendation: Support the proposal that 44(2)(a) be slightly amended to confirm that it relates to the taking of the evidence of witnesses by deposition only, and no other amendments.

The Commission provisionally proposes that, where orders are made against third parties, those third parties should have the usual full right of appeal, rather than the restricted right of appeal which applies to arbitral parties. They note that third parties have not agreed to arbitration or to limit their recourse to courts. However, the Commission has also noted that it believes that section 44 already empowers the courts to make orders against third parties and that it would not be desirable to try and codify the limitations on this power due to the distinctive nature of each dispute and the overlapping rules and requirements that could be at play. For the same reason, we would not support an express right to full appeal for those third parties. We suggest that is for the courts to determine on a case-by-case basis whether a third party is first bound by the arbitral agreement, which can be the case despite the party not being an express party to the agreement, and thus it is for the courts to determine whether a full right of appeal is applicable to that third party.

Item 4. Section 67 (challenging the award: substantive jurisdiction)

Options might include the following. (i) Provide that, where the applicant took part in the arbitral proceedings, any challenge to a previous decision by the tribunal as to its jurisdiction is by way

of review of the tribunal's decision, rather than a re-hearing. (ii) Provide the same remedies under section 67 as are available under sections 68 and 69. (iii) Provide that section 31 (the tribunal to rule on its jurisdiction) and section 32 (the court to rule on the tribunal's jurisdiction) are mutually exclusive alternatives.

Jurisdictional challenges against arbitral awards (section 67)

The Commission considers whether in circumstances where a party had participated in proceedings and questioned Tribunal's jurisdiction under section 30 and then challenged the arbitrator's finding of jurisdiction under section 67, a full rehearing or an appeal would be best suited to deal with the challenge. The initial proposal is that an appeal is a viable option and that the final arbiter of jurisdiction should be the courts (i.e. a review rather than a full rehearing).

Recommendation: Cautiously support the proposal.

The suggestion by the Commission to amend section 67 to express a right of appeal on an arbitrator's finding of jurisdiction in an award, rather than a right of full rehearing as is the current practice, is the most multifaceted of the suggestions in its review. On the one hand, in its current state the interpretation of the section is that, after an award has been issued either on the merits of a dispute or on jurisdiction separately, the losing party may present its case on jurisdiction to the courts de novo. The arguments in support of maintaining this system are numerous.

It has been argued that, as the right to rehearing is limited to findings on jurisdiction and since jurisdiction is the fundamental source of a tribunal's power to resolve disputes in arbitration, the safeguards for ensuring that tribunals make legally sound determinations on this issue should be broader than with any other aspect of a dispute. Even so, it has been asserted that courts are not required to give de novo reviews and there is a suggestion that the court can exercise their case management powers to limit the extent of the evidence that would be presented in a section 67 re-hearing. There is also a suggestion that limiting the right to an appeal only would shift the authority to give the final word on jurisdictional findings away from the courts and toward the arbitrator.

Furthermore, there is a concern that altering the application of section 67 would create a mechanism for reviewing jurisdictional findings that conflicts with the mechanism in section 103. Section 67 applies to arbitrations seated in England, Wales, and Northern Ireland and so such applications are made to the courts as the referee within a dispute and as the authority affirming the legitimacy of awards made at their seat. Section 103 deals with awards made in foreign jurisdictions and which parties wish to enforce in England, Wales, and Northern Ireland. To limit the right to a jurisdictional review to an appeal in locally seated arbitrations via section 67 would potentially leave the right of a full rehearing open to parties enforcing foreign awards under section 103.

Additionally, there is concern that without a right of full rehearing, parties would be stuck with the evidentiary scope established by an arbitral tribunal, even if it were inappropriately narrow. In such cases, the courts' hands might be tied if restricted to that same evidence. Similarly, it would limit courts' ability to ensure the doctrine of *kompetenz-kompetenz* as applied in the Act via section 30 was done so in accordance with the law of England, Wales, and Northern Ireland. Further, since the proposal suggests that amendments apply only to parties who participated in the arbitration and made jurisdictional objections to the tribunal, this would imply a different approach for parties who

failed to participate in the arbitration. If non-participating parties were allowed a full re-hearing on awards of jurisdiction, then this could even operate to encourage non-participation and a “wait-and-see” strategy where parties could hedge the odds of a tribunal declining jurisdiction on a prima facie review of the available evidence, but, failing that, nothing would be lost as a full de novo hearing is on offer.

On the other hand, arguments in favour of the proposal are equally numerous. One problem that the proposal would address is the burden of time and cost involved in a full rehearing in the courts. The prevailing party in arbitration can be subject to a lengthy and extensive repeat of their arguments, one where the losing party has the opportunity to adjust their arguments, amend their submissions, and produce new evidence. The proposal would thus preempt a second problem where parties are able to treat an arbitral hearing on jurisdiction as a “dress rehearsal” for their case to the courts on a section 67 application and be rewarded by getting two bites at the cherry. Thirdly, once in the courts, judges who are unfamiliar with the dispute may be overwhelmed with the volume of evidence needed to make a judgment. It would inevitably require considerable additional time than presentation to the arbitral tribunal. This creates burdens on the courts.

And while some argue that a right to full re-hearing is in line with practice in certain jurisdictions, it has also been argued that in most jurisdictions, such mechanisms are more limited and jurisdictional laws, including the UNCITRAL Model Law, err on the side of strengthening the *kompetenz-kompetenz* of arbitrators. It is indeed a fundamental principle of commercial arbitration that parties are in that forum by their own consent. Parties have also had the opportunity to select their arbitrator and it is assumed that they have done so because they have confidence in that person to understand the law and to properly analyse the information put in front of them. This is especially true of participating parties. Parties in arbitration have selected their forum and must not be allowed to avoid the consequences by returning to the courts if the outcome turns out not to be to their liking.

On balance, there does not seem to be any objection to the proposal that cannot be dealt with effectively if the amendments are made thoughtfully and with full consideration of how the interplay with other relevant sections of the Act could be affected. Since the current right under section 67 is rarely used in its current form, the likely effect of the proposal will be to further reduce the number of applications, rather than open a door for frivolous attempts or for second bites at the cherry. The burden on courts and parties in the rare cases where section 67 is currently applied is immense. The proposal would reduce this burden while still allowing parties the right to a court review of the tribunal’s findings on jurisdiction. It also maintains the courts’ position as the final arbiter of jurisdiction in arbitration under the Act.

As to the interplay with section 103, the proposed amendment should take the relationship between the two into account while also recognizing that enforcing foreign awards entails distinct issues from refereeing disputes seated in the courts’ local jurisdiction. However, inadvertent creation of a two-tiered enforcement framework could be detrimental to the reputation and desirability of England, Wales, and Northern Ireland as a seat. This is a delicate balancing act, and any reform of section 67 should not upend this.

As to synchronizing the remedies available in section 67 with those in sections 68 and 69, we fully support this proposal as it avoids the inconsistent outcomes with adverse findings under 68 and 69 which can be seen in several cases. There does not seem to be a rational reason that 67 should be different.

As to section 32, we do not believe the approach in section 67 would need to be duplicated in this section since these applications deal with requests to the court to determine the tribunal's jurisdiction. These requests would arise before a tribunal has decided this issue or rendered an award. Such applications already require the permission of the tribunal and courts and so there is no need to limit the scope of the application to an appeal.

Item 5. Section 69 (appeals on a point of law)

Is there a need to revisit the language of this section?

Appeals on a point of law (section 69)

In the Commission's view, the wording of section 69 offers a satisfactory compromise between the importance of the finality of arbitral awards and the necessity to correct errors of law and it is "applied consistently and in common to everyone".

Recommendation: There is no need to revisit the wording of section 69.

We believe that the Act is the only national arbitration legislation to allow an automatic right to appeal ("opt-out") on a point of law in both international and domestic arbitration. This is a key differentiating feature of the Act among other jurisdictions internationally and the main contrasting feature to the UNCITRAL Model Law. Much has been said about the competitiveness of the Act in terms of making England, Wales, and Northern Ireland and attractive seat in international arbitration. Surveys done by universities and law firms have repeatedly indicated that this feature is particularly attractive to many parties and practitioners.

Few parties outside of some industries (such as the shipping industry) avail themselves of the unique right of appeal that section 69 provides, indicating that the drafting is sufficiently succinct to avoid abuse of the right. The argument that section 69 should be redrafted to increase the finality of awards appears to be insufficiently supported by evidence and potentially seeks to address a problem that does not exist. The risks associated with attempting to change the language would appear to outweigh the benefit of such an exercise. Further, shipping parties, as one of the largest groups of users of the right, have uniformly expressed a desire to retain the language as being a valued feature that ensures London's place as leading seat for shipping disputes.

Item 6. Duty of confidentiality

Should it be stated expressly that arbitrations are private and confidential? Some jurisdictions attempt a fulsome statutory code on arbitral confidentiality. What about transparency? Is there a middle ground: unless the parties otherwise agree, arbitration proceedings are private and confidential as a general principle; such principle may be departed from with lawful reason?

Confidentiality

The Act does not offer a provision on confidentiality in arbitration, however, in the Commission's view, a proposed codified provision on the matter might not be appropriate since not all types of arbitration can and should be confidential.

Recommendation: Support inclusion of provision on confidentiality on an opt-out basis.

Confidentiality is one the distinctive features of the arbitral forum and one of the primary reasons parties choose to arbitrate their disputes. To strengthen the ability of parties to utilise arbitration as a means of legitimate private dispute resolution, an affirmative statement of the assumption of confidentiality is highly desirable. The assurance of confidential proceedings provides parties increased confidence to make honest efforts to present their case in full in arbitration. The suggestion that the relevant standard of confidentiality be developed in case law is not convincing. This risks numerous interpretations and an inconsistent application of law to something that is a key feature of the arbitration mechanism. We recognise the difficulties of drafting wording that adequately captures the manifold aspects of confidentiality (and the exceptions to confidentiality in particular), but we consider that broad wording that is further developed through caselaw should be workable, and we note that several arbitral institutions, such as the LCIA, already have confidentiality provisions in their rules.

It has been suggested that with the move of state governments via the investor state arbitration forum to a system of default transparency that a reservation be made that confidentiality language would not apply to disputes involving public interests or state actors. It is noted that the UK government declined to sign the UNCITRAL Transparency Convention, as have all but 5 other states. Therefore, it is unlikely that such a carve out would be desirable to governments and would be unlikely to pass in legislation. Thus, an opt-out mechanism is preferred as this would allow for an assumption of confidentiality in commercial disputes while allowing states to expressly decline to assert sovereignty in cases where the public interest in transparency outweighed the interest in confidentiality. This would also allow commercial parties the option to opt-out of assumed confidentiality by party agreement where they so choose.

Item 7. Duties of independence and disclosure

Perhaps codify that an arbitrator has a continuing duty to disclose any circumstance which might reasonably give rise to justifiable doubts as to their impartiality. Should there also be a duty of independence? Or do the duties of disclosure and impartiality do the trick?

Independence of arbitrators and disclosure

The Commission concludes that it is important to emphasize impartiality and arbitrators' continuing duty to disclose any circumstances which might result in justifiable doubts as to their impartiality (see *Halliburton v Chubb*). The current determination of the Commission is that a specific provision on the duty of arbitrators' independence should not be included.

Recommendation: Support the inclusion of language affirming the ongoing duty of disclosure of arbitrators and inclusion of language on impartiality.

Halliburton v Chubb was an important case in clearly affirming the ongoing duty of disclosure owed by each arbitrator. This was an area where the common law analysis had become unduly complicated and lacking in clarity. However, the scope of the ongoing duty still appears to be unsettled by the case. Further, while the affirmation by the court of the existence of an ongoing duty helped to strengthen the common law in this area, the outcome of the case seemed to contradict the finding of a breach of that duty. This left many questions still open for debate and there have been significant criticisms that the outcome was not in line with practice in many other

jurisdictions. Thus, express language in the Act affirming what is already accepted in common law and providing for a bright line consequence of the violation of this duty is needed.

An express provision could also answer the question of the scope of the ongoing duty. This could be accomplished by including language in the Act that an arbitrator has a "continuing duty to disclose any circumstances which might give rise to justifiable doubts as to an arbitrator's impartiality." Such language is widely accepted in international arbitral practice as establishing an objective standard, as opposed to a subjective standard whereby the burden falls entirely to the arbitrator to establish the appropriate scope of disclosure. This would relieve that burden while also assuring parties of recourse if the arbitrator fails to meet the disclosure standard.

The purpose of such a duty is to remove any risk of an arbitrator acting with bias towards a party and to assure that they act with impartiality. There is also independence, of course, which involves an arbitrator's connections to the parties and interest in the outcome of the dispute. We believe that impartiality is the most critical aspect and should be affirmatively stated. The risk with including language of independence is that practitioners from international jurisdictions, and particularly civil jurisdictions, interpret a requirement of independence to fall much more broadly than a common law interpretation. This could potentially lead to unnecessary challenges to international awards, both foreign and seated under the Act, on the basis of lack of independence by an arbitrator. The existence of rigorous international standards of best practice in this area provide sufficient opportunity for parties to make an educated agreement within the dispute as to the scope of independence they desire from their arbitrator without implicating the impartiality requirement. Therefore, impartiality language would be necessary while independence language would not be critical.

Item 8. Discrimination

Perhaps provide that an appointment cannot be challenged on the basis of a protected characteristic, and a contrary agreement is not enforceable, unless it is an occupational requirement, applied as a proportionate means of achieving a legitimate aim.

Discrimination

The review paper proposes the term "protected characteristics", defined in the Equality Act 2010, be used in the context of challenges to arbitrator appointments and enforceability of an arbitration agreement. These characteristics are age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation. Thus, any challenge on the basis of such characteristics would not be possible, while any arbitration agreement regarding one of such characteristics would be unenforceable. This is without prejudice to situations where such characteristics are essential for legitimate purposes of a particular case.

Recommendation: Support the proposal.

It has become clear in recent years that arbitration as an industry has remained insulated from the positive societal moves towards diversity and inclusion at all levels. Arbitrators still tend to be overwhelmingly male and, in the international context, Caucasian males from the northern hemisphere, whether as a result of conscious or unconscious bias. This creates significant ethical and legal questions as to whether a legislative Act that is known to allow (or at least, does not

actively oppose) practices that have a discriminatory effect can be perceived as fully legitimate. There is no doubt that creating a legal obligation against active discrimination on the basis of protected characteristics is the moral thing to do. However, the wording used to address this via the Act needs to be carefully considered in light of case law and the fundamental principle of party autonomy in arbitration.

The suggested language that the appointment of an arbitrator should not be susceptible to challenge on the basis of the arbitrator's protected characteristics seems to be a way of affirming the place of protected characteristics in arbitration practice but does not directly address the main problem that currently exists. The core of the issue of diversity in arbitration occurs at the time of selection of a neutral and not at the point of challenge to an appointment. It appears that the suggested language that *"any agreement between the parties in relation to the arbitrator's protected characteristics should be unenforceable, unless in the context of that arbitration, requiring the arbitrator to have that protected characteristic is a proportionate means of achieving a legitimate aim,"* seeks to address the problem more directly. However, what constitutes a "legitimate aim" is unclear and is likely to open the door to actions in the courts seeking clarification. This, in our view, is potentially an unseen benefit as it gives courts the opportunity to affirm the societal value of diversity and inclusion and apply it directly to arbitration in a public form.

Item 9. Technology

Ensure that the Act is compatible with new technology. Perhaps state expressly (in section 34(2)) that procedural and evidential matters include whether to adopt environmentally sustainable practices like remote hearings and electronic documents.

Modern technology

The Commission asks consultees whether the Act might expressly empower an arbitral tribunal to order remote hearings and the use of electronic documentation.

Recommendation: Support inclusion but not as a requirement.

The digital transformation of the legal sector in the UK has been a major focus and area of investment by government in recent years. It would be appropriate to include language on technology to synchronize arbitration as a part of that effort. Indeed, the support for the use of advancing technology in arbitration would be an effective endorsement of modernization of the industry and would proactively support monitoring of future developments in this area that could become relevant, such as the use of artificial intelligence. It could also play into the ongoing attractiveness of England, Wales, and Northern Ireland as a seat in coming decades.

Item 10. Section 29 (immunity of arbitrator)

Provide that immunity extends to the costs of arbitration claims in court; and that immunity is retained following resignation, perhaps unless the resignation is shown to be unreasonable.

Immunity of arbitrators

According to the Commission, the Act should lend more support to the immunity of arbitrators, particularly when it comes to their liability for the costs of court applications. It also requests comments on whether liability for resignation should also be considered.

Recommendation: Support the inclusion of language strengthening of arbitrator immunity.

The suggestion of inclusion of language on arbitrator immunity is an important one. Increasingly, parties use perceived gaps in arbitrator immunity under national legislation to tactically pressure arbitrators within an arbitration or to attempt nullification of adverse awards on frivolous grounds of arbitrator impropriety. Affirming a strong regime of arbitrator immunity will help maintain the ability of an arbitrator to act impartially within an arbitration. It will also eliminate frivolous challenges to awards or situations where arbitrators and institutions are sued for declining appointments because parties refused to affirm immunity, as happened to Ciarb in a recent case dismissed on appeal to the Supreme Court (see *Sangamneheri v The Chartered Institute of Arbitrators & Ors* [2022] EWHC 886 (Comm) (12 April 2022)). It will also allow arbitrators protection to step down from appointments where they believe they cannot fulfill their duties and curtail the possibility of parties undermining the reputation of an arbitrator as a means of retaliation for an adverse award.

To the specific situation of liability for stepping down from a role, the included language should allow this but should also provide that this immunity is not unlimited. Including term "unreasonable" is one option but one that could be subject to wide interpretation. Other options could be, as in other jurisdictions, that arbitrators incur liability when they act with "gross negligence," which would include situations where they step down causing the parties injury. In this situation, claims against an arbitrator would be analogous to a tort claim and evaluated in light of their duty to the parties, which could be a more precise analysis.

Item 11. Possible minor amendments

(a) Tidy up the language of section 39? Perhaps change the heading to 'power to make provisional orders' (rather than 'awards'). State that the tribunal can grant any remedy (rather than 'relief') which it could grant in a final award – and cross-refer to section 48.

(b) Is there a need to update the language of costs? Perhaps provide in section 61(1) that the tribunal can make orders or awards (plural) on costs. And in section 61(2) state the general principle that the costs of the successful party should be paid by the unsuccessful party, taking into account the parties' relative success, and their conduct, unless it appears to the tribunal proper in the circumstances to depart from that general principle. State in section 63(5) that recoverable costs are those which are reasonable and proportionate.

(c) Section 70(3) (time period to challenge award): add that, if there has been a request under section 57 for a correction or additional award material to the application or appeal, any application or appeal must be brought within 28 days of the date when the applicant or appellant was notified of the result of that process.

(d) Delete section 70(8) (allowing an appeal on terms against a decision to allow an appeal on terms).

(e) Delete sections 85 to 88 (domestic arbitration agreements).

Section 39 (power to make provisional awards)

The Commission notes that section 39 is headed "power to make provisional awards", but the text of section 39 refers, not to awards, but to orders. They ask consultees whether the heading of section 39 should be amended for consistency to refer to orders, rather than awards.

Recommendation: Support proposal.

The suggested heading change is a sensible one since it would ensure ease of use of the Act and better reflect the substantive content of the section. This would eliminate some confusion while leaving the operation of the language untouched.

Section 70 (challenge or appeal: supplementary provisions)

The Commission provisionally proposes that section 70(3) be amended so that time runs from the date when the arbitral party was notified of the result of their request under section 57.

Recommendation: Support proposal.

The proposal of the Commission ensures that courts can determine that a party did not miss their opportunity under section 70(3) because they were availing themselves of the right provided in section 70(2). The two provisions should not be a mutually exclusive choice and this common-sense suggestion provides clarity on the when the clock would start on section 70(3).

Sections 85 to 87 (domestic arbitration agreements)

The Commission notes that sections 85 to 87 have never been brought into force. It provisionally concludes that there is no merit in treating domestic arbitrations differently. It proposes that these sections be repealed.

Recommendation: Do not support proposal.

We do not agree with the Commission's assertion that there is no obvious merit in treating domestic arbitrations differently from international arbitrations and so would not prima facie support the proposal. The difference in practice for domestic and international arbitrations is not a direct comparison to the difference between domestically seated international arbitrations and foreign arbitrations and thus the absence of grounds for treating them differently has not been sufficiently explored in our view. Therefore, we would not support the proposal to delete these sections outright. Rather, we would prefer to maintain the provisions until further law and practice are developed on this point. In a sense, it is likely to be better to have it and not need it than to need it and not have it at this juncture.

Further possible minor amendments from preliminary review paper

Section 7 (separability of arbitration agreement)

The Commission asks consultees whether section 7 should be made mandatory.

Recommendation: Support a modification of proposal.

The proposal seems to stem from the Commission's view that if an arbitrator finds that both the underlying contract and the arbitration agreement are invalid, then the award itself expressing the finding on the underlying contract is invalid. Unless parties agree otherwise, a finding that the arbitration agreement is invalid is a finding of a lack of jurisdiction to hear the merits of the dispute on the underlying contract. If the arbitration agreement is invalid, then the arbitrator need not examine the validity of the underlying contract. The problem would arise when, in the absence of a party agreement removing separability, the arbitrator makes a finding that that arbitration agreement is invalid but then proceeds to also make a declaration on the validity of the underlying agreement. If parties have agreed to remove separability, then an award with both findings would be valid. Thus, rather than removing parties' ability to make such agreements, we would support a modification stating that in the event the parties do not agree otherwise, the award is separable and that in this default situation a finding of invalidity of the arbitration agreement operates to remove jurisdiction from the arbitrator.

Appeals from section 9 (stay of legal proceedings)

The Commission provisionally proposes to correct what the House of Lords has previously identified as a drafting error and confirm that an appeal is available from a decision of the court under section 9.

Recommendation: Support proposal.

Since this is a matter of a clear and unintentional drafting error, it would only be sensible to take the opportunity to correct this, which also prevents appellants who might tactically waste party and court time and costs asserting this in an effort to prevent an appeal.

Sections 32 and 45 (court determination of preliminary matters)

The Commission asks consultees whether the sections might benefit from being simplified, so that they require merely the agreement of the parties or the permission of the arbitral tribunal, and not the additional satisfaction of the court. The court would still retain its general discretion.

Recommendation: Support proposal.

Since courts automatically retain discretion that this cannot be waived, there seems to be no reason to include this in the language of the Act. Since the language regarding the court can be removed without affect, we would support this removal in the interests of simplicity and clarity

Topics not included in review

Choice of law applicable to the arbitration agreement:

In 2020 the Supreme Court examined the issue of determining the law applicable to arbitration agreements in the cases of *Enka v Chubb and Kabab-ji v Kout Foods.* These cases sought to provide some clarity on the interpretation of how the law applicable to analysing the validity and effectiveness of and arbitration agreement is determined in the absence of an express provision for disputes seated in England, Wales, and Northern Ireland. This issue has been a source of

confusion since before the *Sulamerica* case and the recent case law has not provided a clear formula. This issue is not unique to disputes seated in England, Wales, and Northern Ireland. Some jurisdictions, including Scotland, have chosen to include language in their governing arbitration law mandating that for disputes seated in that jurisdiction, in the absence of an express provision, the governing law of the arbitration agreement is the law of the seat (see the Arbitration (Scotland) Act 2010, section 6).

The judgements in *Enka and Kabab-ji* may have provided another chapter in the saga of this topic, but, in our view, have not settled the matter. Currently, the only means parties have of protecting against having to battle this issue in the courts is to include express provisions in their dispute resolution agreements, a practice that was rarely considered in the past. We believe this area is ripe for legislative cure. The common law that has developed here, though understandable as to why the courts have treated it as they have, has still not provided the clarity that parties and practitioners seek. We recommend an express provision in the Act, probably along the lines of the Arbitration (Scotland) Act 2010.

Recommendation: Provide analysis and proposed language in this area as part of the final review.

Climate change and other Environment, Social and Governance (ESG) disputes:

The Commission briefly mentions climate change in their review but does not elaborate on the potential connection between climate change goals and the Act. The UK government has affirmed its adoption of climate change mitigation principles through its adoption of several international instruments, including the Paris Agreement. In order for states to meet their obligations under the international climate regime, a significant amount of investment will be required. Much of this investment capital will be at the local level direct to industry and will involve new streams of foreign investment, both imported and exported. These investments are very likely to give rise to disputes which will be resolved under the current investment dispute resolution framework and will require the use of investor-state arbitration or commercial arbitration as applied to public-private partnership agreements.

Cases where there is a question of the proper law to apply to the merits of a dispute are on the rise. Challenges to award enforcement on the basis that arbitral tribunals applied substantive law that was neither foreseen by the parties nor justified in the interpretations of the underlying treaty or commercial contract are also on the rise. Currently, sections 68 (locally seated and domestic arbitration) and 103 (foreign seated arbitration) do not restrain the courts from reviewing a decision on the grounds of excess of mandate for failure to apply proper law. The result is that courts have little appetite or ability to invalidate awards even when the arbitral tribunal failed to apply mandatory law invoked by the underlying agreement or treaty or where they exceeded their mandate by applying law with tenuous connection to the dispute.

Climate benchmarks and obligations are now mandatory obligations on state governments. In disputes involving state parties, these obligations will have a vital role to play as to whether states are both able to incorporate legislation to meet these mandates and as to whether consequences for failing to comply with them will be possible. Without such an international dispute framework, especially in disputes arising directly from investments made in green technology, climate impact mitigation, or assisting an industry to become more sustainable, may be impossible. Therefore, the ability for courts to review of awards under section 68 and section 103 on the grounds of excess

of mandate for failure to apply governing climate change laws may promote implementation of climate protection agreements, such as the Paris Agreement commitments. The same applies to international frameworks also developing around social and governance standards and the UN's sustainable development goals.

Recommendation: Examine the possible language or guidance on sections 68 and 103 so that neither section is to operate to prevent courts from invalidating arbitral awards for excess of mandate or failure to apply the proper mandatory law.

Mediation and hybrid ADR procedures

We wish to bring to attention the increasingly common global practice of using mediation and arbitration in tandem. There are many ways of doing this and it can be of huge benefit to parties in relation to time, direct costs, opportunity costs, environmental costs, and the much lower level of enforcement required where settlements have been reached between the parties by consensus. Ciarb, therefore, wishes to ensure that England, Wales, and Nothern Ireland maintains a leading position in promoting effective practice in dispute resolution legislation, procedure, and culture, specifically in enabling and encouraging the complementary use of arbitration and mediation wherever appropriate and possible.

While there are a wide variety of views among our members about how proactively arbitrators should promote the use of mediation within a dispute, there seems to be some consensus that it is appropriate for arbitrators to use their discretion and professional judgement to facilitate meetings with all parties and representatives present to assist the parties in resolving some, if not all the issues. Such meetings are generally referred to as "settlement conferences."

While we do not foresee the issue of guidance on hybrid med-arb or mixed mode ADR being addressed specifically via the Act, we note that legislation to this effect which covers alternative dispute resolution and its overlapping use with arbitration is possible. Indeed, the coming into force of the Singapore Mediation Convention on international recognition and enforcement of mediated settlements and the signals from government that the UK could accede to this convention, combined with recent consultations on mandatory mediation, indicates that mandatory legislation on commercial mediation could be forthcoming.

The increasing nuance and formalisation of practice in other jurisdictions in this area highlights the need both to be explicit about what is being referred to and to ensure for the sake of arbitrators, mediators and above all arbitration users, for boundaries, guidelines and ethics of mixed-mode use of private dispute resolution processes to continually be made clear. Ciarb provides guidelines for mediation in arbitration which are publicly available, and we commend them to parties, advisors, and arbitrators. Further detail can be found in the Ciarb guidelines. https://www.ciarb.org/media/16823/ciarb-professional-practice-guideline-on-the-use-of-mediation-in-arbitration-2021.pdf

There continues to be broad consensus in common law contexts globally that acting as a mediator, where meditation is defined as *"a process where the third party facilitates a process which includes separate private sessions with the different parties, during which confidential information may be divulged under the explicit, or implicit, understanding that this confidential information will not be shared with the other party, and that it is conducted with the aim of the parties reaching a mutually agreed outcome,"* is not an appropriate role for an arbitrator. In the

event of the parties wishing to use such a process, the mediation and any subsequent arbitration must be conducted by different individuals with the relevant skills in the two different processes. However, it is noted that there is considerable international divergence in terminology and understanding of what is meant by "mediation" and/or "settlement conference."

As an example, the German Arbitration Rules (DIS) compel the arbitrator to attempt actively to facilitate amicable settlement, which recently led to a lively discussion among those arbitrating and mediating in Asia about whether this highlighted a difference in civil and common law practice (with a perception there of civil law practice as being less adversarial), or whether the issue stemmed from a difference in assumptions as to what constituted mediation; in other words, if all parties and advisors are kept together, and no confidential information exchanged, then has the arbitrator conducted a "mediation" or a "settlement conference?"

Recommendation: Consider adding forward looking language recognising the use of alternative dispute resolution mechanisms within arbitration and further consider adding a statement that nothing in the Act shall be seen as prohibiting such practices.

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