Ciarb Response to the Call for Evidence from the House of Lords Special Public Bill Committee on the Arbitration Bill

13 February 2024

The Chartered Institute of Arbitrators (Ciarb) [1] welcomes the opportunity to provide a response to the call for evidence issued on 25 January 2024 from the House of Lords Special Public Bill Committee (the Committee) on the Bill to Amend the Arbitration Act 1996 (Arbitration Bill).[2]

Ciarb is an international centre of excellence for the practice and profession of alternative dispute resolution. Ciarb is headquartered in London and has more than 17,000 members based in 149 countries and an international network of 43 branches. Ciarb's core objective is to is to promote and facilitate worldwide the determination of disputes by all forms of ADR, including arbitration. Ciarb provides education and training for arbitrators, mediators and adjudicators. It also acts as a global hub for practitioners, policy makers, academics and those in business, supporting the global promotion, facilitation and development of all ADR methods.

Ciarb greatly appreciates the opportunity to provide comments to this Committee regarding the Arbitration Bill. Our comments focus on three core issues:

1. Proposed reforms and likely impact
2. Clause 1(2) of the Arbitration Bill (new Section 6A to the Arbitration Act 1996)
3. Clause 11 of the Arbitration Bill (Section 67 of the Arbitration Act 1996)

We have outline those elements below.

[1] See, www.ciarb.org .

[2] https://committees.parliament.uk/committee/695/arbitration-bill-hl-special-public-bill-committee/news/199590/call-for-evidence-issued-on-the-arbitration-bill-hl/

Proposed reforms and likely impact

As a leading professional body for dispute resolvers, we have welcomed the review of the Arbitration Act 1996 to modernise the legislation and ensure that the needs of parties and arbitrators are being met. We support arbitration-related reforms that will uphold the high standards and reliability of the United Kingdom and the City of London as a global center for arbitration and to strengthen, clarify and widen the practice of arbitration.

As part of the Law Commission's consultations and review of the Arbitration Act 1996[3], Ciarb submitted two previous responses in December 2022[4] and March 2023[1]. We were pleased to see that most of Ciarb's recommendations were included in the Law Commission's recommendations in its June 2023 report.[2] We are also pleased to see that the Law Commission's recommendations were widely adopted into the current version of the Arbitration Bill.

Overall, we support the proposed reforms in the Arbitration Bill and believe that these reforms will have a positive impact on the United Kingdom and the City of London as a continued important global center for arbitration.

Clause 1(2) of the Arbitration Bill (new Section 6A to the Arbitration Act 1996)

We support the Law Commission's recommendation for the addition of Clause 1(2) of the Arbitration Bill (new Section 6A to the Arbitration Act 1996), which provides that the arbitration agreement is governed by the law of the seat, unless the parties expressly agree otherwise.[3]

In our previous submissions to the Law Commission's consultations, we noted that the common law analysis to determine the law applicable to the arbitration is complex.[4] We noted that some of our Members expressed concern that the cases *Enka v Chubb* and *Kabab-ji v Kout Foods* have created additional uncertainty for parties, and a simple default rule in the Arbitration Bill will remove much of the opportunity for argument and satellite litigation.[5] The default rule in Section 6A preserves party autonomy by starting with the expectation of express party agreement in 6A(1)(a). We agree with the Law Commission that the default rule may also see more arbitration agreements governed by the law of England and Wales, and that by applying the default rule to an arbitration with any seat, that the rule 'potentially captures and resolves a wider range of circumstances'.[6] For these reasons, we maintain our position that the addition of default

[3] [h]https://lawcom.gov.uk/project/review-of-the-arbitration-act-1996/

[4] Ciarb Response 1 to Law Commission, https://ciarb.org/news/ciarb-issues-response-to-uk-arbitration-act-review/

rule in Section 6A is welcome statutory remedy and a simpler test than the ones outlined in the common law.

However, we also would like to note that the addition of Section 6A is not universally supported by all our Members. Some Members have pointed out that the principles set out by the Supreme Court in *Enka* are useful and supportive of arbitration when identifying the governing law of an arbitration agreement.[7] For example, in the Court of Appeal's recent decision in *UniCredit Bank AG v RusChemAlliance LLC*, the Court applied the general rule in *Enka* that the choice of law in the main contract represents a choice of law for the arbitration agreement, which in that case was English Law.[8] This is contrasted with the exception to that general rule in *Enka* where the governing law of the arbitration agreement will be the law of the seat, which in this case was France. Some Members wished to emphasize that the inclusion of a default rule in Section 6A would remove some of the flexibility of common law as outlined in *RusChem,* and that the default to the seat of arbitration may lead to unintended consequences where the 'ends of justice' for parties are not met.[9]

On balance, we believe that the addition of a statutory default rule in Section 6A will provide clarity for arbitrators and parties to examine the proper law governing the arbitration agreement.

Clause 11 of the Arbitration Bill (Section 67 of the Arbitration Act 1996)

We support the addition of Clause 11 of the Arbitration Bill (Section 67 of the Arbitration Act 1996), which is in line with our previous two sets of recommendations on challenging jurisdiction under Section 67 that Ciarb proposed to the Law Commission during their consultation.[10]

Conclusion

Ciarb appreciates the opportunity to provide the Committee with comments on the Arbitration Bill. We appreciate the Committee taking steps to update and involve a wide range of stakeholders. Ciarb remains available to provide any evidence or input to the Committee or others on the Arbitration Bill.

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[1] Ciarb Response 2 to Law Commission, https://ciarb.org/news/ciarb-responds-to-uk-s-second-consultation-on-the-arbitration-act-1996/

[2] Law Commission's Final Report, https://cloud-platform-e218f50a4812967ba1215eaecede923f.s3.amazonaws.com/uploads/sites/30/2023/09/Arbitration-final-report-with-cover.pdf

[3] https://bills.parliament.uk/bills/3515/publications

[4] Ciarb Response 1 to Law Commission https://ciarb.org/news/ciarb-issues-response-to-uk-arbitration-act-review/

[5] Enka Insaat Ve Sanayi A.S. (Respondent) v OOO Insurance Company Chubb (Appellant), UKSC 2020/0091. Ciarb Response 1 to Law Commission, https://ciarb.org/news/ciarb-issues-response-to-uk-arbitration-act-review/. Ciarb Response 2 to Law Commission, https://ciarb.org/news/ciarb-responds-to-uk-s-second-consultation-on-the-arbitration-act-1996/.

[6] Law Commission's Final Report, at [12.68 to 12.75], https://cloud-platform-e218f50a4812967ba1215eaecede923f.s3.amazonaws.com/uploads/sites/30/2023/09/Arbitration-final-report-with-cover.pdf

[7] Enka Insaat Ve Sanayi A.S. (Respondent) v OOO Insurance Company Chubb (Appellant), UKSC 2020/0091 at [170]

[8] UniCredit Bank AG v RusChemAlliance LLC, [2024] EWCA Civ 64 at [69]

[9] See at [77], '*More fundamentally, it seems highly unlikely that an arbitration in Paris would be allowed to proceed. As Mr Houseman pointed out, without the protection of an anti-suit injunction from the English court, which is the only court available and able to grant such an injunction, there would be nothing to stop RCA from applying to the Russian court for an injunction to prevent UniCredit from pursuing any arbitration. The evidence is that Russian courts readily grant such injunctions. Mr Hossain was not in a position to offer any undertaking that RCA would not seek such an injunction if free to do so. As UniCredit has assets in Russia, it would then have no choice but to comply. Moreover, the Russian court now has all the material which it will need in order to determine RCA's claim on the bonds and, without an injunction in place, it must be highly likely that judgment in favour of RCA, applying Russian law, would be given in short order, and such a judgment could be readily enforced in Russia. The suggestion that substantial justice could be obtained by UniCredit in France, whether in court or in arbitration, is an illusion.*' UniCredit Bank AG v RusChemAlliance LLC, [2024] EWCA Civ 64. See also, at [57-69] and [74].

[10] Ciarb Response 1 o Law Commission and Ciarb Response 2 to Law Commission, https://ciarb.org/news/ciarb-issues-response-to-uk-arbitration-act-review/, https://ciarb.org/news/ciarb-responds-to-uk-s-second-consultation-on-the-arbitration-act-1996/.