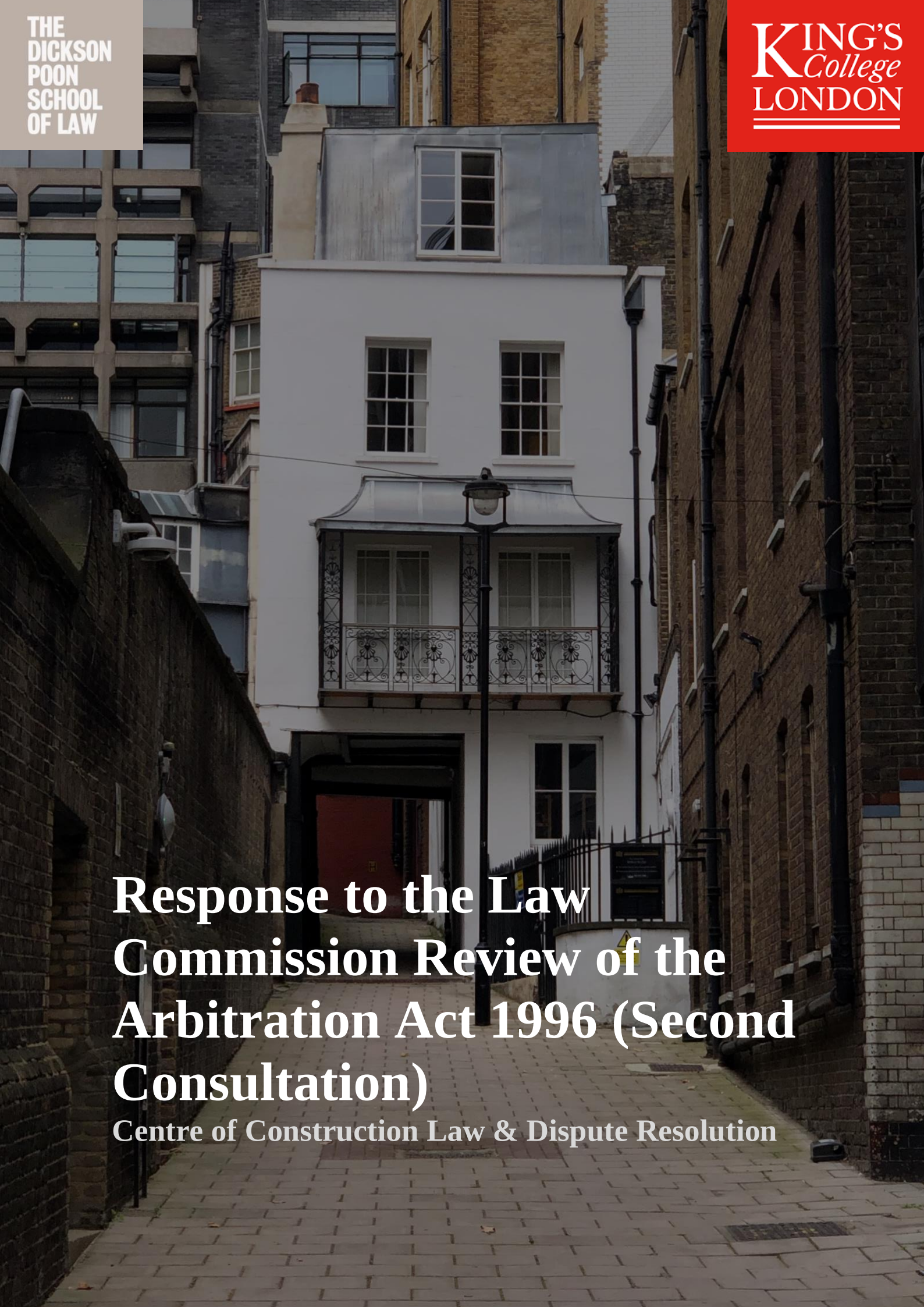

THE DICKSON POON SCHOOL OF LAW

KING'S College LONDON

Response to the Law Commission Review of the Arbitration Act 1996 (Second Consultation)

Centre of Construction Law & Dispute Resolution

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Centre of Construction Law & Dispute Resolution

The Centre of Construction Law & Dispute Resolution (the 'Centre' or 'CCLDR') was founded in 1987 by Professor John Uff KC CBE, who was its first Director and the Nash Professor of Engineering Law. The current Director is Professor Renato Nazzini PhD FCIArb. The main activities of the Centre are:

- The MSc programme, taught since 1988 in London
- Conferences and public lectures on all aspects of construction law
- Research and publications on all aspects of construction law

The Centre is part of The Dickson Poon School of Law at King's College London, which is consistently ranked among the top law schools internationally.

Introduction

In September 2022, the Law Commission of England & Wales published a consultation paper relating to its 'Review of the Arbitration Act 1996'. The paper asked 38 consultation questions exploring various areas of possible reform, ranging from confidentiality to appeals on a point of law. The CCLDR responded to that consultation.[1]

The Law Commission published a second consultation paper in March 2023, with the aim of analysing three specific issues deeper: (i) the proper law of the arbitration agreement, (ii) challenging jurisdiction under section 67 and (iii) discrimination. The CCLDR responds to the second consultation in this paper. To this end, the Centre has again consulted its Taskforce of leading experts in arbitration and construction law who have been closely associated with the Centre and have contributed to the response to the first consultation paper.

Proper law of the arbitration agreement

Consultation Question 1.

We provisionally propose that a new rule be included in the Arbitration Act 1996 to the effect that the law of the arbitration agreement is the law of the seat, unless the parties expressly agree otherwise in the arbitration agreement itself. Do you agree?

We agree with the proposal and note that the CCLDR was among the respondents to the first consultation paper that advocated a revision of the law on this point. In our view, *Sulamérica v Enesa*[2] and, more significantly, the subsequent *Enka v Chubb*[3] resulted in an outcome that may reduce the attractiveness of England, Wales and Norther Ireland, and, particularly, London, as a seat for international arbitration. Parties rarely choose the law applicable to the

[1] Renato Nazzini and Aleksander Kalisz, 'Response to the Law Commission Review of the Arbitration Act 1996' (*Centre of Construction Law & Dispute Resolution*, 16 December 2022) <https://www.kcl.ac.uk/construction-law/assets/ccldr-response-to-the-law-commission-review-of-the-arbitration-act-1996.pdf> accessed 15 April 2023.

[2] *Sulamerica CIA Nacional de Seguros SA and others v Enesa Engenharia SA and others* [2012] EWCA Civ 638.

[3] *Enka Insaat Ve Sanayi A.S. v OOO Insurance Company Chubb* [2020] UKSC 38.

arbitration agreement.[4] The current law begs the question as to why parties who have expressly chosen the seat are presumed to have chosen, as the law applicable to the arbitration agreement, not the law of the seat, which, according to *Sulamérica* and *Enka*, has the closest connection with it, but the law of the underlying contract, which has a weaker relationship with the arbitration agreement.[5]

Decisions in *Sulamérica* and *Enka* provide a paradoxical view. On the one hand, they concur with many earlier decisions[6] that the law with which the arbitration agreement is most closely connected is the law of the seat and not the law of the underlying contract. On the other hand, they presume that, if the parties have chosen the law that governs the underlying contract, this is as an implied choice of law to the arbitration agreement. This is even more striking given the emphatic view expressed by the Court of Appeal and the Supreme Court as to the close connection between the law of the seat and the arbitration agreement. In *Sulamérica*, the Court held:

> *No doubt the arbitration agreement has a close and real connection with the contract of which it forms part, but its nature and purpose are very different. In my view an agreement to resolve disputes by arbitration in London, and therefore in accordance with English arbitral law, does not have a close juridical connection with the system of law governing the policy of insurance, whose purpose is unrelated to that of dispute resolution; rather, it has its closest and most real connection with the law of the place where the arbitration is to be held and which will exercise the supporting and supervisory jurisdiction necessary to ensure that the procedure is effective.*

In a similar vein, the Supreme Court in *Enka* said that:

> *In the absence of any choice of the law that is to govern the arbitration agreement, it is necessary to fall back on the default rule and identify the system of law with which the arbitration agreement is most closely connected. In accordance with our earlier analysis, this will generally be the law of the seat chosen by the parties (...)*

We argue that, not least for the reasons that the Court of Appeal and the Supreme Court set out above, English law should apply by default the law of the seat to the law of the arbitration agreement, in the absence of party agreement, rather than the law of the underlying contract.

We propose, therefore, that, in the absence of an express selection of law, the amended Arbitration Act 1996 should specify that the law of the seat should be applied to the arbitration agreement. There are many reasons why this change in the law would be beneficial to the attractiveness of England, Wales and Northern Ireland, and London in particular, as a place for arbitrating disputes. These include:

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[4] Renato Nazzini, 'The problem of the law governing the arbitration clause between national rules and transnational solutions' in Renato Nazzini (ed), *Construction Arbitration and Alternative Dispute Resolution* (Routledge 2022); Renato Nazzini, 'The law governing the arbitration agreement: a transnational solution?' in Renato Nazzini (ed), *Transnational Construction Arbitration: Key Themes in International Construction Arbitration* (Routledge 2018).

[5] Renato Nazzini 'The Law Applicable to the Arbitration Agreement: Towards Transnational Principles' (2016) 65 ICLQ 681-703.

[6] *XL Insurance Ltd v Owens Corning* [2001] 1 All ER (Comm) 530; *C v D* [2008] 1 Lloyd's Rep. 239; *Abuja International Hotels Ltd v Meridien SAS* [2012] EWHC 87 (Comm).

1. **Choosing the law with the closest connection**. Consistently with the approach of the English courts, the law of the seat is the law of the closest connection with the arbitration agreement. Therefore, it is better to have that law applied to the arbitration agreement, rather than the law of the main contract – a law that has a weaker connection with the arbitration agreement.

2. **Harmonisation with the law of the courts in control of the process**. The seat determines the courts that have control over the arbitral process. Therefore, if the law of the arbitration agreement and the *lex arbitri* were the same, this would result in the more efficient outcome of the courts having supervisory jurisdiction over the arbitration applying their own law to the arbitration agreement, unless the parties have agreed otherwise. This is likely to result in more predictable and reliable decisions by a less expensive process. It is logical to presume that this is what commercial parties would intend. Of course, it is perfectly possible for English courts to apply a law different from English law when hearing applications concerning the validity and interpretation of the arbitration agreement. However, this is a less efficient and commercially sound outcome, and it is unlikely that commercial parties would have intended this.

3. **Preserving key features of arbitration**. As mentioned in the CCLDR's previous response, applying the law of the seat to the arbitration agreement would deprive the parties of some key features of arbitration available under English law but not necessarily under other laws, such as confidentiality or separability. By choosing to arbitrate in London, the parties are likely to have intended the confidentiality and separability provisions of English law to apply to the proceedings. However, if the law of the main contract is not English law, the rules relating to confidentiality, which result from terms implied in the arbitration agreement, and separability, will not be those of English law, but, potentially, those of the law of the underlying contract. The parties may find themselves in an arbitral procedure very different from the one that they intended.

4. **Choosing a neutral law for the arbitration agreement**. Parties typically choose the seat of arbitration for the neutrality of the *lex arbitri*. Therefore, this neutral law should also apply to the arbitration agreement as the arbitration agreement is the contract that governs the dispute resolution process and confers jurisdiction on the tribunal. It is logical that a neutral law, and, therefore, the law of the seat, and not the law of the underlying contract, should apply to matters of process and jurisdiction, in the absence of an agreement to the contrary.[7]

We believe that there are at least two possible inspirations for the wording of the amended Arbitration Act 1996: the Scottish and Swedish approaches. The Arbitration (Scotland) Act 2010 provides the following in section 6:

> ***Law governing arbitration agreement***
> *Where—*
>
> > *(a)the parties to an arbitration agreement agree that an arbitration under that agreement is to be seated in Scotland, but*

[7] Renato Nazzini 'The Law Applicable to the Arbitration Agreement: Towards Transnational Principles' (2016) 65 ICLQ 681-703.

(b)the arbitration agreement does not specify the law which is to govern it,

then, unless the parties otherwise agree, the arbitration agreement is to be governed by Scots law.

The above wording, if adapted *mutatis mutandis* to England, Wales and Northern Ireland, would have the added benefit of unifying the law on the arbitration agreement across the whole of UK, which may provide some more certainty to international parties. However, the section only applies to arbitrations seated in Scotland and not those seated abroad. We agree with the Law Commission that this would pose problems because each time the seat is not in England, Wales or Northern Ireland, *Enka* would still apply, resulting in divergent outcomes depending on where the seat is. Such divergent outcomes would not be justified as the reasons for a rule that provides that, unless the parties expressly agree otherwise, the law governing the arbitration agreement is the law of the seat apply whether the seat is in England, Wales or Northern Ireland or elsewhere.

We also agree with the Law Commission's contention that the wording of the Arbitration (Scotland) Act 2010 poses challenges as it only applies if the parties expressly agree on a seat in the arbitration agreement. For instance, the LCIA Arbitration Rules in Article 16 provide a default London seat for the parties unless they choose one in writing. Such a selection of a seat through the arbitration rules would not be treated as an express choice of seat in the arbitration agreement by the provision. Furthermore, section 3 of the Act provides that the juridical seat of the arbitration is the seat designated: "*(a) by the parties to the arbitration agreement, or (b) by any arbitral or other institution or person vested by the parties with powers in that regard, or (c) by the arbitral tribunal if so authorised by the parties, or determined, in the absence of any such designation, having regard to the parties' agreement and all the relevant circumstances*". Therefore, in all circumstances other than the designation by the parties, again *Enka* would still apply. This would produce inconsistent and illogical outcomes.

The Swedish Arbitration Act 1999 applies the law of the seat regardless of whether the arbitration is seated in Sweden or elsewhere unless the parties agree otherwise:

Section 48

Where an arbitration agreement has an international connection, the agreement shall be governed by the law agreed upon by the parties. Where the parties have not reached such an agreement, the arbitration agreement shall be governed by the law of the country in which, by virtue of the agreement, the proceedings have taken place or shall take place.

The first paragraph shall not apply to the issue of whether a party was authorised to enter into an arbitration agreement or was duly represented.

In our view, the Swedish approach is preferable. Its application to arbitrations seated outside of England, Wales and Northern Ireland would leave no room to apply the common law principles in *Enka v Chubb*.[8] Since the reasons for selecting the seat are the same regardless of

[8] Specific statutory conflict rules would, however, continue to apply. Importantly, section 103(2)(b) of the Act, which gives effect to Article V(1)(a) of the New York Convention, provides that recognition or enforcement of an award may be refused if the parties against whom it is invoked proves "*that the arbitration agreement was not*

whether the parties opt for England, Wales and Northern Ireland or any other jurisdiction, there is no reason for English law to treat these situations differently. In fact, it would be complex to do so.[9]

In contrast with the Swedish approach, however, we would qualify how parties can reach an agreement as to the seat. Although there should be no requirement for such an agreement to be made expressly in the arbitration agreement, it should be made in writing and with specific reference to the arbitration agreement. The reason for this caveat is that often, particularly in construction disputes, a contract is constituted by several documents. The main dispute resolution clause may be found, for example, in the general conditions of contract, whereas the law governing the arbitration agreement may be specified in the particular conditions. Would this count as an express choice "in" the dispute resolution clause, as the Law Commission proposes? In our view, insofar as the reference to the arbitration agreement is express and specific and, of course, in writing, the choice of law can be contained in a different clause or document.

Challenging jurisdiction under section 67

Consultation Question 2.

We provisionally propose the following approach to a challenge under section 67 of the Arbitration Act 1996.

Where an objection has been made to the tribunal that it lacks jurisdiction, and the tribunal has ruled on its jurisdiction, then in any subsequent challenge under section 67 by a party who has participated in the arbitral proceedings:

(1) the court will not entertain any new grounds of objection, or any new evidence, unless even with reasonable diligence the grounds could not have been advanced or the evidence submitted before the tribunal;

(2) evidence will not be reheard, save exceptionally in the interests of justice;

(3) the court will allow the challenge where the decision of the tribunal on its jurisdiction was wrong.

Do you agree?

We agree to the Law Commission's clarification as to the new proposed appeal under section 67. We note that the test as to whether the decision of the tribunal was wrong does not necessarily require the court to give deference to the decision of the tribunal and could be construed as a full-merits appeal.

valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made".

[9] Renato Nazzini 'The Law Applicable to the Arbitration Agreement: Towards Transnational Principles' (2016) 65 ICLQ 681-703.

Consultation Question 3.

We provisionally propose that the Arbitration Act 1996 be amended to confer the power to make rules of court to implement the proposals in CQ2 above. Do you agree?

If the Law Commission takes the above proposals forward, we support codifying the above principles in the Act itself. This is the current approach. The grounds on which the parties may challenge an award and the remedies that a court may grant are set out in the Act. Part 62 of the CPR deals with procedural matters only.

The reason for this approach is important. The Act is intended to be a comprehensive and clear set of rules to be understood by commercial parties, within and outside the United Kingdom. Something so fundamental as appeals on jurisdictional grounds should be clearly and succinctly provided for in the Act not in secondary legislation, which may be less accessible and less readily comprehensible to an international audience.

Discrimination

The CCLDR opposes all and any forms of discrimination in arbitration and elsewhere. For instance, our research and recommendations on the issue of diversity in UK construction adjudication[10] have led to the establishment of the Women in Adjudication network as well as the Equal Representation in Adjudication Pledge under the auspices of The Adjudication Society.[11] However, we believe that, when legislating in relation to dispute resolution procedures such as arbitration, a main feature of which is that the parties may choose, directly or indirectly, the arbitrators, care should be exercised in order to avoid unintended consequences.

Consultation Question 4.

We provisionally propose that it should be deemed justified to require an arbitrator to have a nationality different from that of the arbitral parties. Do you agree?

We agree. Most leading arbitration rules already provide that the nationality of the arbitrator should be different to that of the parties. For instance, the LCIA Arbitration Rules 2020 provide perhaps the strongest principle against arbitrators having the same nationality as the parties in Article 6.1:

> *Upon request of the Registrar, the parties shall each inform the Registrar and all other parties of their nationality. Where the parties are of different nationalities, a sole arbitrator or the presiding arbitrator shall not have the same nationality as any party unless the parties who are not of the same nationality as the arbitrator candidate all agree in writing otherwise.*

[10] Professor Renato Nazzini and Aleksander Kalisz, '2022 Construction Adjudication in the United Kingdom: Tracing trends and guiding reform' (Centre of Construction Law & Dispute Resolution 2022) <https://www.kcl.ac.uk/construction-law/assets/2022-construction-adjudication-in-the-united-kingdom-tracing-trends-and-guiding-reform-feb23.pdf> accessed 16 May 2023.

[11] See: https://www.adjudication.org/diversity/diversity-in-adjudication-initiative.

The 2018 DIS Arbitration Rules contain a similar provision in relation to sole arbitrator tribunals and three-member tribunals in Articles 11 and 12.3 respectively:

> *If the arbitral tribunal is comprised of a sole arbitrator, the parties may jointly nominate the sole arbitrator. If the parties do not agree upon a sole arbitrator within a time limit fixed by the DIS, the Appointing Committee of the DIS (the "Appointing Committee") shall select and appoint the sole arbitrator pursuant to Article 13.2. In such case, the sole arbitrator shall be of a nationality different from that of any party, unless all parties are of the same nationality or have agreed otherwise.*
>
> *(...)*
>
> *If the co-arbitrators do not nominate the President within the time limit provided in Article 12.2, the Appointing Committee shall select and appoint the President pursuant to Article 13.2. In such case, the President shall be of a nationality different from that of any party, unless all parties are of the same nationality or have agreed otherwise.*

ICC Arbitration Rules 2021 provide more flexibility on the issue in Article 13.5:

> *Where the Court is to appoint the sole arbitrator or the president of the arbitral tribunal, such sole arbitrator or president of the arbitral tribunal shall be of a nationality other than those of the parties. However, in suitable circumstances and provided that none of the parties objects within the time limit fixed by the Secretariat, the sole arbitrator or the president of the arbitral tribunal may be chosen from a country of which any of the parties is a national.*

Similarly, the SCC Arbitration Rules 2023 state in Article 17(6):

> *If the parties are of different nationalities, the sole arbitrator or the chairperson of the Arbitral Tribunal shall be of a different nationality than the parties, unless the parties have agreed otherwise, or the Board otherwise deems it appropriate.*

Article 6(7) of the UNCITRAL Arbitration Rules 2013 provides that appointing authority shall:

> *[H]ave regard to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and shall take into account the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties.*

We note that some arbitration rules contain no wording at all on this point, including SIAC, VIAC, CIETAC and the Swiss arbitration rules.

If any provision against discrimination based on protected characteristics is introduced in the Act, we believe it is imperative to deem justified to require an arbitrator to have a nationality different from that of the parties, unless both parties have the same nationality.

Consultation Question 5.

Do you think that discrimination should be generally prohibited in the context of arbitration?

Consultation Question 6.

What do you think the remedies should be where discrimination occurs in the context of arbitration?

We believe that any form of discrimination should be fought against with a view of eliminating it. We note, however, that our views on the questions asked by the Law Commission depend on what solution the Law Commission precisely envisages and, in particular, how it proposes to amend the Act.

It is important that, if legislation is passed to prohibit discrimination in the context of arbitration generally, such legislation should, as a minimum:

1. Be clear and clearly comprehensible to commercial parties, within and, importantly, outside the United Kingdom, as to what is and what is not permissible. Any cross-references to other pieces of legislation, such as the Equality Act 2010, would be unhelpful and substantially defeat the purpose of the Act, which is that of being a clear and comprehensible piece of legislation which provides certainty and predictability.

2. Ensure that it cannot be used to undermine arbitration agreements and challenge awards, whether in England, Wales and Northern Ireland and elsewhere, for example at the enforcement stage, based on all sorts of arguments that can be easily concocted as to purported discriminatory elements in the arbitration procedure or discriminatory conduct by any of the parties, arbitrators or institutions involved in the process.

3. Ensure that England, Wales and Northern Ireland, and, particularly, London, continue to be attractive arbitration seats. The answer to this is not, with respect to the Law Commission, that they may become unattractive only to parties who wish to discriminate. Even parties who are committed to non-discrimination may find the prospect of unpredictable new rules, protracted satellite litigation and unquantifiable risks as to the validity and enforceability of the award not worth taking, however laudable the objective pursued may be.

4. Ensure that parties are permitted to continue to choose the best arbitrators, counsel, and experts suited for their case on merits and without risking undermining the validity and enforceability of the award.

As regards remedies, as the Law Commission rightly points out, there are already remedies for discriminatory conduct or elements in the procedure or award. For example, if the tribunal behaves in a way that discriminates against a party or its counsel, sections 24 and 68 already provide effective remedies. Equally, an award that gives effect to discriminatory provisions in a contract could violate public policy under section 68 or under the New York Convention. Any discriminatory or offensive conduct is further subject to disciplinary procedures of associations such as the Bar Standards Board, the Solicitors Regulation Authority, arbitral institutions or professional organisations such as The Chartered Institute of Building or The Royal Institution of Chartered Surveyors relevant particularly to construction disputes. Individuals who behave in a discriminatory manner typically face disciplinary action in such organisations.

As to behaviour by a party or its counsel, the IBA Guidelines on Party Representation in International Arbitration 2013 provide the following remedies for misconduct:

26. If the Arbitral Tribunal, after giving the Parties notice and a reasonable opportunity to be heard, finds that a Party Representative has committed Misconduct, the Arbitral Tribunal, as appropriate, may:

(a) admonish the Party Representative;

(b) draw appropriate inferences in assessing the evidence relied upon, or the legal arguments advanced by, the Party Representative;

(c) consider the Party Representative's Misconduct in apportioning the costs of the arbitration, indicating, if appropriate, how and in what amount the Party Representative's Misconduct leads the Tribunal to a different apportionment of costs;

(d) take any other appropriate measure in order to preserve the fairness and integrity of the proceedings.

27. In addressing issues of Misconduct, the Arbitral Tribunal should take into account:

(a) the need to preserve the integrity and fairness of the arbitral proceedings and the enforceability of the award;

(b) the potential impact of a ruling regarding Misconduct on the rights of the Parties;

(c) the nature and gravity of the Misconduct, including the extent to which the misconduct affects the conduct of the proceedings;

(d) the good faith of the Party Representative;

(e)relevant considerations of privilege and confidentiality; and

(f) the extent to which the Party represented by the Party Representative knew of, condoned, directed, or participated in, the Misconduct.

Enclosures:

1. Renato Nazzini 'The Law Applicable to the Arbitration Agreement: Towards Transnational Principles' (2016) 65 ICLQ 681;

2. Renato Nazzini, 'The law governing the arbitration agreement: a transnational solution?' in Renato Nazzini (ed), *Transnational Construction Arbitration: Key Themes in International Construction Arbitration* (Routledge 2018);

3. Renato Nazzini, 'The problem of the law governing the arbitration clause between national rules and transnational solutions' in Renato Nazzini (ed), *Construction Arbitration and Alternative Dispute Resolution* (Routledge 2022).

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