Talk to COMBAR on 16 April 2024

"What Next for London Arbitration?"

1. Many thanks for inviting me to give this talk.

2. I'll begin with a statement often said to have been made by Otto von Bismarck: "*Laws are like sausages. It is best not to see them being made*." That may or may not be an apt way to introduce the topic of the Arbitration Bill.

3. The making of the Bill has, in my view, actually been a significant success story so far. The Law Commission did a very comprehensive '25 years on' review of the Arbitration Act 1996, and produced many sensible and useful proposals. They were also excellent listeners. The views of stakeholders including COMBAR, who prepared very professional, well-researched and persuasive responses, were heard. A striking illustration is the governing law point. It was covered briefly in the original paper but was not the subject of a reform proposal. However, the Law Commission then took it up in their second consultation paper, following submissions from many quarters; and it now stands as clause 1 in the Bill.

4. The lawmaking process not been without the occasional twist and turn. No-one appears to have noticed that clause 1 might have an unintended effect on investor-state arbitrations, until someone spotted it at quite a late stage in the process. The Government is still considering how best to address the point. It is a problem only in relation to non-ICSID arbitrations, because section 3 of the Arbitration (International Investment Disputes) Act 1966, as amended, already disapplies most of the arbitration Act 1996 to those arbitrations. The virtual absence from the Law Commission's lengthy reports of any mention of investor-state arbitrations may suggest that they did not envisage any change in relation to them.

5. There was also the interesting and important wrinkle that when the Bill was published, it provided for the new governing law provision to apply only to post-

enactment arbitration agreements. As various parties pointed out, that would have prolonged the existing situation for decades. However, that matter was addressed, with the Law Officers accepting that applying the new rule to all post-act arbitrations, whenever the arbitration agreement was made, would not involve unacceptable retrospection.

6. A recent amendment proposed forward by Lord Mendelson would have provided that:

> "an arbitration tribunal must not purport to exceed its jurisdiction in accordance with the Act and, in particular, must not make decisions that impact, or purport to impact, on the legal rights or obligations of the parties, or of any persons connected to them."

One might think that the whole purpose of an arbitration is to make a binding decision as to the parties' legal rights and obligations. However, in the recent debate in the Special Bills Committee on 27 March 2024 it became clear that the objective of the amendment was simply to ensure that tribunals should not exceed their jurisdiction, for example by making orders as to access to children in the context of a family dispute. The amendment was withdrawn following an assurance by the Minister as to the importance of that fundamental principle.

7. I'll return later to the likely impact of the Bill should it become law, but first revert briefly to the sausages aphorism. The general view seems to be that it was uttered not by Bismarck but by the American poet John Godfrey Saxe, writing in the Chronicle of the University of Michigan in 1869. Saxe also wrote a poem about a certain group of people who *"Disputed loud and long, Each in his own opinion Exceeding stiff and strong, Though each was partly in the right, And all were in the wrong!"* That may or may not be an apt introduction to the broader topic of arbitration in London.

8. With our without a new Arbitration Act, there is good reason to believe that arbitration in London is thriving and will continue to do so. It is not always easy to find up-to-date statistics. However, the LMAA – consistently by far the highest volume arbitral institution in London – last month reported that in 2023 it made 3,268 new appointments in an estimated 1,845 references. That was an

increase from the numbers in 2022, which were themselves significantly higher than in the previous year. The LCIA's last published figures were for 2022, when it reported a slight drop in referrals compared to 2021, down from 387 to 333; and according to the LexisNexis survey for 2022; the ICC and SIAC also reported modest decreases from 2022 to 2021. I understand that the LCIA figure went back up to 377 in 2023.

9. Moreover, England has remained an arbitration-friendly environment in terms of court intervention. The recently published Commercial Court report for 2022/23 indicated that no appeals on a point of law were successful during that period, nor any section 68 challenges, nor any jurisdiction challenges. The overall number of all such challenges received also remained low, at 46, 25 and 8 respectively.

10. I should touch on concerns expressed about how the decisions in *Federal Republic of Nigeria v Process & Industrial Developments* and *Contax Partners v Kuwait Finance House* , both in the 2023/24 period, might affect the reputation of the institution of arbitration.

11. You will be familiar with the *Nigeria* case, in which Robin Knowles J concluded that a substantial award had to be set aside on the grounds of serious irregularity. They had been procured by fraud, including adducing knowingly false evidence, bribery of a public official and the claimant's receipt and retention of Nigeria's privileged documents. As the judge said, it was important that section 68 was available to maintain the rule of law, and he highlighted the importance of disclosure in that context.

12. The *Contax Partners* case initially came before me on an urgent without notice application. The defendant had just learned that its bank had received a final third party debt order for £3.1 million, pursuant to an arbitration award that had been registered under section 66 of the 1996 Act. They had been unaware of any arbitration or court proceedings. The Kuwaiti arbitral institution under whose auspices the award had purportedly been issued had no record of it. On examination, the award bore a rather close resemblance to a judgment which my colleague and friend Picken J had issued in a completely unrelated case,

Manoukian v Société Générale de Banque au Liban SAL [2022] EWHC 669 (QB). Although the names had been changed, the resemblance extended to such matters as reference to indemnity costs to be the subject of detailed assessment: an incongruous concept in the context of a Kuwaiti, or indeed any, arbitration award. I granted interim relief, and in due course Butcher J set aside the registration of the award. It naturally adds to Picken J's kudos that his work was evidently recognised as the epitome of legal writing, worthy of wholescale plagiarism.

13. Having mentioned those two cases, Lord Bellamy in the recent debate on the Bill said it was greatly to the credit of our system that the issues were properly exposed and, in the end, the system worked well. No doubt having in mind the concluding remarks in Robin Knowles J's judgment, Lord Bellamy referred to the ICC Commission on Arbitration and ADR having commissioned a task force "*to explore current approaches to allegations or signs of corruption in disputes and to articulate guidance for arbitral tribunals on how to deal with such occurrences*". He said he had written to the main arbitral institutions seeking their assistance, asking what measures they have in place to mitigate the risk of corruption in arbitration, whether more should be done in the sector to mitigate corruption in arbitration, the best way to proceed and how the Ministry of Justice and the Government could support the sector's efforts. I know those enquiries have started, and feel sure they will meet with considered responses.

14. Returning to the Bill itself, which is now at the Report stage in the House of Lords, what difference will it make, if enacted, to the future of arbitration in London?

15. First of all, its mere existence carries a positive message. It shows that the UK sees arbitration as sufficiently important to have undertaken a very comprehensive and careful review in order to ensure that its regime is up to date and attractive to parties to contracts.

16. The Bill contains useful provisions to tidy up and fill gaps in basic processes such as the powers of emergency arbitrators, court powers exercisable vis a vis third parties in support of arbitrations, and the time limits for challenges. For

example, clause 8 would treat emergency arbitrators in the same way as normal arbitrators for the purposes of sections 41 to 44 of the 1996 Act. So, as the explanatory notes say, where an arbitrating party fails to comply with an emergency arbitrator's order, the arbitrator will be able to issue a peremptory order (by section 41 as amended), and if there is still no compliance, an application can be made to court for the court to order compliance with the arbitrator's order (under section 42). Alternatively, an application can be made directly to court, for the court to make its own order (under section 44).

17. The new provision on the law governing an arbitration agreement will make it the law of the seat unless the parties expressly agree otherwise. This should promote clarity. Moreover, for arbitrations seated in English laws, given English law's use of the separability doctrine and its broad view on arbitrability, the new rule will tend to reduce the risks of arbitrations turning out to have been ineffective.

18. At the same time, we will have to take the rough with the smooth. Sometimes the new rule will mean the arbitration agreement is governed by an overseas law, and that could sometimes mean there is no 'gateway' under which the English court can assume jurisdiction. By way of example, you will recall the recent cases involving *RusChem*. In the first, *Deutsche Bank v RusChemAlliance*, an anti-suit injunction was sought to protect ICC arbitration in Paris under an English law contract. Applying *Enka*, Bright J concluded that the arbitration agreement was subject to English law, despite the French seat. That was the only basis on which the English court had jurisdiction over the matter all, as can be seen from the CA's judgment (at [2023] EWCA Civ 1144 § 35). That is because the relevant contract for jurisdiction purposes was the arbitration agreement, not the main or matrix contract. Moreover, as both Bright J and the CA noted, applying *Ust-Kamenogorsk Hydropower Plant JSC v. AES Ust-Kamenogorsk Hydropower Plant LLP* [2013] UKSC 35, jurisdiction did not arise under the interim injunction power conferred by section 44 of the Act because the ASI was not granted "*for the purposes of and in relation to arbitration proceedings*". So the finding of an English law governed arbitration agreement was critical. Under the new rule, the default rule would have meant

that French law governed the arbitration agreement, so the English court would have lacked jurisdiction.

19. A similar situation arose in *Unicredit Bank v RusChemAlliance* [2024] EWCA Civ 64. Sir Nigel Teare decided that the *Enka* presumption was disapplied, given French case law to the effect that the French court would regard the arbitration agreement as governed by "French substantive rules applicable to international arbitration". On that basis, the only jurisdictional gateway advanced – that the arbitration agreement was governed by English law – did not apply, so the court lacked jurisdiction. The Court of Appeal disagreed, concluding that the French law was simply that the law governing the arbitration agreement depended on the parties' common intention. On that basis, it applied *Enka* and concluded that the arbitration agreement was governed by English law. Again, the outcome might have been different under the new rule. All the more reason, perhaps, to choose an English seat for one's arbitration, even if the main contract is governed by another law.

20. I'll turn now to the slightly vexed question of jurisdiction challenges under section 67 of the 1996 Act. I have made some of these points in other fora, but they bear repetition. As a reminder, the Arbitration Bill's main change in relation to section 67 would be to provide that rules of court "may" – it is permissive – include provision that where a party has taken part in an arbitration and the tribunal has ruled on an objection to its substantive jurisdiction, then three restrictions apply:

    i) first, the applicant cannot rely on a new ground for the objection that was not raised before the arbitral tribunal, unless it was not known and could not with reasonable diligence have been discovered at that stage;

    ii) secondly, the applicant cannot adduce evidence that was not heard by the tribunal unless the applicant could not with reasonable diligence have put the evidence before the tribunal; and

    iii) thirdly, evidence that was heard by the tribunal must not be re-heard, unless the court considers it necessary in the interests of justice.

On 27 March the Special Bills Committee agreed an amendment that applies the 'interests of justice' proviso to all three restrictions.

21. The discussion of challenges to substantive jurisdiction under section 67 of the Arbitration Act took up more than 60 pages of the Law Commission's first consultation paper, second consultation paper and final report, with the page count increasing each time. In some ways that is not surprising: it is a perennial issue attracting strong feelings on both sides; underlying it is a point of principle about not holding parties to a dispute resolution procedure to which they have not in fact consented; and the issue generated a large number of responses from those in the market.

22. It's worth bearing in mind, though, the limited frequency with which problems of the kind the Law Commission was trying to address actually arise.

23. The Commercial Court report for 2019/2020 recorded that only 19 jurisdiction applications had been issued; there were then 15 the following year, 27 in 2021/2022 and 8 in 2022/23. Those figures are obviously tiny compared to the 4,000 or more arbitrations taking place here every year.[1]

24. Equally striking is the relative rarity of reported cases where a section 67 challenge has involved the court hearing substantial amounts of, or any, oral evidence.

25. A number of jurisdiction challenges have turned on questions of law (English or foreign) or contract interpretation, rather than pure fact. For instance:

    i) The applicant in *Electrosteel Castings v Scan Trans Shipping & Chartering Sdn Bhd* [2002] EWHC 1993 (Comm) argued that no contract, and hence no arbitration agreement, had come into being at all. Gross J construed the relevant telexes and decided the jurisdiction issue in a 1-day hearing.

    ii) *Peterson Farms Inc v C&M Farming* [2004] EWHC 121 (Comm) revolved around the question of whether under Arkansas law it was

[1] 3,798 new arbitrations in 2021 for the six main institutions, plus ad hoc arbitrations

possible (in simple terms) to pierce the corporate veil in a group of companies. Langley J disposed of the challenge after a two-day hearing.

iii) Aikens J in *Primetrade v Ythan* [2005] EWHC 2399 (Comm), while making clear that the applicant's original 'ground of objection' had to be construed broadly, was able to dispose of the challenge largely based on two points of law under the Carriage of Goods by Sea Act 1992. He also said that the court can refuse to permit new evidence to be adduced if that would result in substantial prejudice to the other side that cannot fairly be dealt with in costs or, if appropriate, an adjournment (§ 62).

iv) The English limb of the recent *Kabab-Ji v Kout Food Group* saga involved a recognition application, but similar issues could arise on a section 67 challenge. Leaving aside the governing law issues, the jurisdiction question depended on whether a parent company could have become party to a franchise agreement, bearing in mind the substantive law on 'no oral modification' clauses.[2] However, the UK Supreme Court made clear, in that case, that the court has a range of tools to enable it to tailor the procedure to the issues, avoiding unnecessary time and cost, for example by dispensing with live witnesses and relying on the transcripts of the evidence given to the tribunal (§ 81).

v) An application I decided last year, in *Port de Djibouti v DP World Djibouti*[3] turned on the construction of the arbitration agreements and certain other provisions of the matrix contracts. There was no oral evidence.

26. Occasionally a jurisdiction challenge turns on a procedural point, such as whether the arbitrator was *functus* or whether a prior arbitration award had already resolved all the issues. Both points arose in a Scottish case last year, *In the petition Arbitration Appeal No 3 of 2022* [2023] CSOH 69.

[2] [2021] UKSC 48
[3] [2023] EWHC 1189 (Comm)

27. There are other cases where a jurisdiction challenge has threatened to unfold vistas of factual evidence but that has been avoided.

i) In *The Kalisti*,[4] Males J held that the applicant could in principle relitigate a question about title to sue. However, it was not allowed to rely on new evidence where it had failed to give full disclosure, to the arbitrator or the court, of the relevant documents.

ii) Teare J's decision in *X v Y* [2015] EWHC 395 (Comm) is a good example of how the court can stop a recalcitrant respondent from ramping up the delay and cost by a jurisdiction challenge. The arbitration claimants had succeeded in the arbitration after a 30 day hearing, which included the respondent's allegations that the contract was procured by bribery. The respondent then challenged jurisdiction on the basis of the alleged bribery. The claimants said the bribery allegation could not deprive the tribunal of jurisdiction, because the separability doctrine applied under both of the two candidate governing laws, English and Iranian. Teare J directed point that to be resolved as a preliminary issue, along with some others. It would require only some limited evidence of Iranian law, it had a real prospect of success, and if successful it would avoid the need to determine the bribery issues at all.

iii) In *Province of Balochistan v Tethyan Copper Company*, there was a prospect of having to litigate a fact-intensive issue about alleged corruption. However, at an early hearing I gave directions for certain preliminary issues to be decided, including whether the applicant had lost the right to object by not fully raising the objection before the tribunal.[5] Robin Knowles J went on to hold that the applicant had indeed lost the right to object.[6]

[4] *Central Trading & Exports v Fioralba Shipping Co (The "Kalisti")* [2014] EWHC 2397 (Comm)
[5] [2020] EWHC 938 (Comm)
[6] [2021] EWHC 1884 (Comm)

28. Having said all that, there will be a residual category of cases where the prospect of rehearing a significant amount of evidence remains live. How, then, would the proposed new rules affect things?

29. The first and obvious point is that we will not know for sure until we see what, if any, new rules the CPR Rules Committee makes, or how any such rules may develop: part of the idea of a rules-based solution is to allow adjustments in light of experience. But let's assume they do start by making the three types of rule the LC envisages.

30. The first rule, restricting new grounds, aligns, as the LC recognises, with the existing provision in s.73(1)(a) preventing reliance on "any objection" not raised on a timely basis. It would not, I suspect, represent a major departure from the present position.

31. The second rule, about fresh evidence, is like the rule applied to merits arguments in criminal appeals. According to some case law, this approach is taken on jurisdiction challenges in Singapore,[7] though there is case law the other way too.[8] It may have the salutary effect of inhibiting parties from deliberately keeping additional evidence up their sleeves for use in court later if needed.

32. The third rule is about restricting the rehearing of evidence the tribunal has already heard. Some of the objections to rehearing of evidence are debatable. For example, the idea that the tribunal's decision is the ruling of an impartial tribunal appointed by the parties: it may not be, and reluctant participation in an arbitration in order to preserve arguments on the merits does not change that. There is also the 'dress rehearsal' point: that a party may see how the jurisdiction argument goes in front of the arbitrator then seek to plug the gaps before the court. That could happen, but (a) there is little sign of it happening often and (b) the other side will easily spot, and the court may draw inferences from, any changes in the story between the two occasions.

33. The key point, though, is that the new provision would leave it to the court to decide where the interests of justice lie. So the potential new rule could

[7] *Government of the Lao People's Democratic Republic v Sanum Investments Ltd* [2015] SGHC 15.
[8] *AQZ v ARA* [2015] SGHC 49 § 59.

accommodate different approaches along a spectrum of cases. At one end lie cases where any oral evidence of fact is peripheral or can easily be taken from good quality transcripts. At the other end might be, for example, a case where the whole jurisdiction debate turns on whether an alleged oral contract was made at all, and the issue is what was or was not said. An example is Phillips J's decision in *A v B* [2015] EWHC 137 (Comm), a contract formation case where the oral evidence mattered. After a 2-day hearing the judge made findings on credibility and held that a contract had been formed, so the arbitrator did have jurisdiction. In that type of case, even under the proposed new rules, the court might think it sufficiently important for it to hear the witnesses itself.

34. Another, more recent, example was Dias J's decision last year in *Emirates Shipping Line v Gold Star Line* [2023] EWHC 880 (Comm), upholding the arbitrators' decision that they lacked jurisdiction. The decision was based mainly on the interpretation of a series of emails, in order to decide whether the claimant had become party to a Memorandum of Understanding. The judge noted that the tribunal had felt hampered by lack of evidence, but that had been rectified by provision of a witness statement exhibiting the contemporary correspondence. The judge heard oral evidence by video link, but it must have been fairly brief as the whole hearing took only a day, and it went only to an estoppel argument: the main decision was document-based. It is not clear from the report whether the oral evidence had also been given before the tribunal. If so, then under the new Act this might be a case where the court would have felt able to rely on the tribunal's findings, failing which the transcripts.

35. To conclude on the topic of jurisdiction challenges, I would not expect the new rules, if brought into effect, to tilt the balance in any significant way compared to the existing position, but they may embolden the courts in addressing apparently unmeritorious challenges in the most efficient way, without unfairly limiting parties' rights to challenge jurisdiction.

36. By way of overall conclusion, there is every reason for optimism. England and Wales has the most outstanding cadre of arbitrators and arbitration lawyers. Its arbitration laws and supervising courts aim to strike the right balance between support for arbitration and intervention on the rare occasions when it is needed.

So long as our arbitral institutions and practitioners can maintain and develop their international presence, particularly across key market regions, the future looks bright.

37. Thank you for listening to me.

Mr Justice Henshaw

16 April 2024