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Final Response to second LC request for consultation on EAA 96 002

Item 1. Proper Law of the Arbitration Agreement

We provisionally propose that a new rule be introduced into the Act 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.

A default rule in favour of the law of the seat would see more arbitration agreements governed by the law of England and Wales, when those arbitrations are also seated here. This would ensure the applicability of the doctrine of separability, along with its practical utility, and would give effect to the more generous rules on arbitrability and scope which the courts have seen fit to develop. More than that, it would remove uncertainty over which law governs an arbitration agreement. We think that the ruling in Enka v Chubb is complex; a simple default rule removes much of the opportunity for argument and satellite litigation.

We ask consultees whether they agree with this proposal.

Response:

Ciarb appreciates the Law Commission's responsiveness to our suggestion, which we understand was also suggested by numerous other respondents, that the consultation examine the law applicable to the arbitration agreement. In our original response we stated that the Enka v Chubb and Kabab-ji v Kout Foods cases had created additional confusion around this issue and that the risk of further litigation was high. We noted that:

"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…"

While some may argue that a new rule is not ideal for the reasons the LC notes well, we agree that a new rule in the Arbitration Act 1996 of the nature proposed by the LC is the best practical remedy available to this increasingly problematic question. Such a rule would also be an assistance to arbitrators and parties since time and expense will not be taken up determining this issue within arbitrations. Arbitrators will also be able to apply the law of the seat in a consistent fashion with any analysis of the arbitration agreement itself, which will in turn further strengthen clarity and practice in this area.

Item 2. Challenging jurisdiction under Section 67

Our updated provisional proposal is as follows: (1) the court should 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 should not be reheard, save exceptionally in the interests of justice; and (3) the court should allow the challenge only where the decision of the tribunal on its jurisdiction was wrong. We propose that this process should be encapsulated in rules of court, rather than in legislation.

We ask consultees whether they agree with the particulars of our revised proposal.

Response:

Ciarb believes that the proposal put forward by the LC is consistent with the recommendations we put forth in our initial response. We particularly support the LC's position as stated that the updated in the updated proposal: "where a tribunal rules on its own jurisdiction before a court does, there is reason for some deference to be shown to that ruling and to the process which led to it."

However, we are uncertain as to the robustness of removing the proposed reforms to rules of court rather than attempting a modification of the Act. We understand the concerns around modification and the impossibility of foreseeing all possible repercussions. The last thing anyone would want is to fix one problem while inadvertently creating numerous others and ultimately damaging the effectiveness or popularity of the Act. Thus, we understand the desire of the LC to proceed cautiously and to test the effects of the proposed modifications via softer instruments. It is hoped that these soft instruments will indeed be created and adopted, and we note that this will require both motivation and action beyond the scope of a review of the Act itself.

Item 3. Discrimination

(a) We now provisionally propose that it should be deemed justified to require an arbitrator to have a nationality different from that of the arbitral parties. We ask consultees whether they agree.

(b) We ask consultees whether they think that discrimination should be generally prohibited in the context of arbitration, and what they think the remedies should be where discrimination occurs.

Response:

(a) Ciarb notes that protected characteristics as defined in the Equality Act 2010 are age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation. Nationality is not included in this list. It has been suggested that nationality is used as a proxy for race in arbitration. We disagree. Nationality of an arbitrator in relation to a party to a dispute is relevant in ensuring the minimal chance for possible political pressure and reducing chances of a tactical challenge on the basis of a lack of impartiality. Thus, it is legitimate for parties to require that an arbitrator not share nationality with either party. However, since nationality is not a protected characteristic under the Equality Act 2010, we see the issue as moot and believe that including an express provision stating this in the Act would be a tautology.

(b) Ciarb notes that in their original response, we encouraged the LC to take the narrower option of stating 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." We stand by this recommendation. We believe that this is compliant with the ruling in the Hashwani case and that, while recognising that discrimination is generally unacceptable, this acknowledges that arbitrators are service providers and not employees of the parties that appoint them. Further, parties may indeed have legitimate reasons for requesting certain protected characteristics if it can be shown the request was a proportionate means of achieving a legitimate aim.

We also would caution that a broad ban on discrimination in arbitration could ultimately achieve the opposite aim of the proposal and amount to a gesture, diluting the actual effectiveness and enforceability of the regulation, since no standard or scope would be provided. The LC noted that the consensus among respondents that the issue was of concern in a very narrow circumstance: appointment of a tribunal. Yet such broad language could open the door to attempts by parties to engage in tactical manoeuvres, such as trying to resist enforcement of an award based on an arbitrator's purported discriminatory attitude towards a party with a protected characteristic. Such a door should not be opened.