Ministry of Justice

Lord Ponsonby of Shulbrede
Parliamentary Under-Secretary of State for Justice

Lord Bellamy KC
House of Lords
London
SW1A 0PW

MoJ ref: SUB116440

15 August 2024

Dear Lord Bellamy,

ARBITRATION BILL: MATTERS RAISED AT SECOND READING

On 30 July the Arbitration Bill had its Second Reading. I thank you and the Noble Lords, Lord Beith and Lord Hacking for your contributions. During that debate, I committed to write further in response to several questions raised.

Clause 13 (Right of appeal against court decision on staying legal proceedings)

Section 9 of the Arbitration Act 1996 (Stay of legal proceedings) allows a party to an arbitration agreement to apply to court to stay legal proceedings, but it does not state expressly that a party can appeal such a decision of the High Court in the Court of Appeal. Case law, via the House of Lords in *Inco v First Choice Distribution* (2000), established that a right to appeal under section 9 of the 1996 Act was intended. Clause 13 of the Bill (Right of appeal against court decision on staying legal proceedings) aims to codify this right of appeal for section 9.

Concerns have been raised that Clause 13 in fact provides a more limited access to the Court of Appeal than was established in by *Inco v First Choice*. The Government is considering this point carefully ahead of Committee and will provide further updates in due course.

Explanatory Notes for Clause 1 (Law applicable to arbitration agreement)

Clause 1 of the Bill provides that that the law governing the arbitration agreement will be the law expressly chosen by the parties, otherwise it will be the law of the seat. Ahead of Second Reading, Noble Lords raised that rare issues may arise where there is no choice of seat in the arbitration agreement, and no seat has yet been designated by the tribunal or the court. There is no express provision for this issue in the new Section 6A which Clause 1 inserts into the Arbitration Act 1996, nor is one required. The Law Commission had considered this point in their final report (see paragraphs 12.60-12.66) and envisaged that it would fall to common law principles. I provided clarificatory words to this effect during my opening speech at Second Reading and will similarly update the Bill's explanatory notes in due course to reflect the position. By doing so, the Government is confident the Courts will have the facility to apply the common law in these circumstances, as intended by the Law Commission.

Arbitral Corruption

Important questions were raised pertaining to the matter of arbitral corruption, in particular whether the Bill should make provision to mitigate against the risk of arbitration being misused. These concerns were first raised in relation to the Arbitration Bill in the previous session, following the High Court's judgment in *Nigeria v P&ID [2023] EWHC 2638 (Comm)*. This is a vital matter that goes to the heart of the UK's attractiveness providing, as it does, an arbitral framework that is both efficient and robust.

The previous Government wrote to leading arbitral institutions seeking views on the mitigations currently in place, and whether more is needed. I understand that responses were received from the Chartered Institute of Arbitrators, the International Chamber of Commerce, the London Court of International Arbitration, the London Maritime Arbitrators Association and the Grain and Feed Trade Association, in addition to Law Society and the Bar Council whose members are often arbitrating or representing parties in arbitration. I also understand that these responses were extensive in detailing the mitigations against corruption that are already in place.

In summary, arbitral bodies have ethics, experience, good standing and professional conduct requirements in place for their members, rules and procedures that provide for duties of fairness and impartiality, as well as training, guidelines, and support with responding to allegations of corruption. Case management policies and procedures also provide mitigation against corruption including through "red flags analysis" as well as compliance with existing requirements under domestic legislation and directives including the Proceeds of Crime Act (2002), the Money Laundering & Terrorist Financing (Amendment) Regulations (2019), the Joint Money Laundering Steering Group guidance notes, and HM Treasury sanctions notices. The UK legal profession also abides by their core duties and is knowledgeable in how to navigate risks of corruption. None of those institutions contacted supported amending the Arbitration Bill on this issue of strengthening anti-corruption. In addition, concerns were raised that an attempt to find a "one-size-fits-all" approach could risk reducing this jurisdiction's appeal. *Nigeria v P&ID* was a highly unusual case, where the High Court effectively performed its proper role in setting aside the award.

It has also been suggested that attempts to combat corruption should be made across the sector at an international level. Support was expressed for the International Chamber of Commerce's anti-corruption task force, which is exploring approaches to allegations or signs of corruption in disputes, and which aims to finish its report and publish guidance by the end of 2025. Responses also detailed further work underway within arbitral institutions to review and update training, codes of conduct, and toolkits to better support arbitrators to tackle corruption. Where a role was suggested for the Government, it was in ensuring that the Courts continue to be equipped to provide checks in cases put before them (as they did in *Nigeria*) and to engage in discussions with the sector and promote its work combating corruption.

The Government's position is that no amendment should be made to this Bill. As you are aware, the Arbitration Act 1996 and the common law already provides a nuanced and flexible approach to deal with corrupt conduct. For example, arbitrators can issue an award which prevents the corrupt party from benefitting from their corruption. Arbitrators are already under a statutory duty to be impartial and to reach a fair resolution of the dispute. Additionally, the common law allows an exception to confidentiality when disclosure is in the public interest. The Government agrees

with the Law Commission's conclusions that a statutory rule in favour of either confidentiality or transparency in arbitration would likely not be sufficiently comprehensive, nuanced or future-proofed, and the debate in the sector internationally should be allowed to further develop. It may also be inappropriate for English law to determine the choice of privacy for other States in their arbitrations.

However, the Government will continue to support the sector's efforts on arbitral corruption. We will keep track of initiatives underway and engage with the sector to push for the swift adoption of best practices as they are developed.

I look forward to continuing working with you as the Arbitration Bill continues its passage through the House.

I am copying this letter to Lord Mance, Lord Thomas of Cwmgiedd, Lord Verdirame and Lord Wolfson of Tredegar. I will also place a copy in the House library.

Yours sincerely,

LORD PONSONBY OF SHULBREDE

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