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Could the Reformed English Arbitration Act Make London a More Attractive Seat for Latin American Parties?

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In recent years, there has been a boom in international demand for Latin American commodities as well as massive foreign investment in the region, especially in the energy, mining and construction sectors. This has led to a corresponding increase in the number of international contracts involving a Latin American party and a foreign party that require a "neutral" forum and law for dispute resolution, and a growing demand for international arbitration in Latin America in both the public and private sectors. In 2023, Latin American states accounted for 35% of ICSID's new cases, and Latin American private parties were among the most frequent users of ICC arbitration.

Traditionally, London has not been an obvious choice of seat for disputes originating from Latin America. Paris has been a more popular international choice of seat, especially for arbitrations involving a Latin American party and a foreign party. The reasons for this are largely historical: many Latin American legal systems are modeled on, or have been deeply influenced by, the French Civil Code. More recently, New York, Miami and Sao Paulo have emerged as popular choices due to geographical convenience and perceived cultural ties with the region.

The forthcoming reform of the English Arbitration Act 1996 ("EEA 1996"), however, provides a unique opportunity for London to establish itself as a preferred seat for Latin American arbitration and play a significant role in arbitration in the region. London is already an attractive choice of seat because it has a highly regarded judiciary, a pro-arbitration stance and a track record of supporting arbitration and enforcing arbitral awards. The key reforms to the EEA 1996 proposed in the draft Amendment bill ("Draft Amendment Bill"), if implemented, would give London several distinct advantages over traditionally popular choices of seat such as Paris, New York, Miami and Sao Paulo.

The sections that follow identify three key proposed reforms to EEA 1996, which would set London apart from other traditionally popular choices of seat for Latin American arbitrations.

1. **Governing Law of the Arbitration Agreement**

The Draft Amendment Bill proposes that, in the absence of an express choice from the parties on the governing law of the arbitration agreement, the applicable law will be the law of the seat. This is one of the most significant reforms proposed in the Draft Amendment Bill.

This reform, if implemented, will reverse the Supreme Court's decision in *Enka v Chubb*, which held that "a choice of governing law for the contract will generally apply to an arbitration agreement which forms part of the contract" (paras. 43- 54; see also here). The consequence of the *Enka v Chubb* rule is that for London-seated arbitrations the parties' choice of a foreign law to govern the contract will automatically displace the non-mandatory provisions of the EEA 1996 where the provision is substantive and not procedural under Section 4(5) of the EEA 1996. These provisions include Section 7 (separability), Section 30 (kompetenz-kompetenz) and Section 58 (finality of awards). As a result, under the current state of the law, parties to a London-seated arbitration with a foreign choice of law governing the contract are not able to rely on the statutory and common law rules developed to protect the integrity of London-seated arbitrations and prevent foreign courts from disrupting the arbitral process.

The proposed reform would implement a straightforward statutory rule that the arbitration agreement is governed by the law of the seat absent an express choice of law. This would ensure that all parties who chose London as an arbitral seat are able to benefit from the full protection of the EEA 1996 and the supportive position of English law, and the English courts.

This reform will align English law with the position taken by the French courts, and avoid clashes such as in the *Kabab-Ji* saga (see here). It also enhances the attractiveness of London as a choice of seat as compared to other jurisdictions where the issue either has not reached national courts, or has not been the subject of legislative reform. In Brazil, the *Enka* question was raised in the *Jirau* case, but the case settled, which prevented the Brazilian Superior Court of Justice from ruling on the matter. As a result, there is uncertainty in Brazil as to how the applicable law of an arbitration agreement is determined. Meanwhile, in the U.S., there is no Supreme Court authority addressing the issue, and the decisions of lower courts have been inconsistent.

2. **Arbitrator Disclosure**

The EEA 1996 prescribes that arbitrators have a duty of impartiality but does not impose a duty of disclosure on arbitrators. Under common law, arbitrators are under a continuing duty to disclose any circumstances which might reasonably give rise to justifiable doubts as to their impartiality, as clarified in *Halliburton v Chubb* [2020] UKSC 48 (see here).

The proposed reforms in the Draft Amendment Bill would place the common law duty of disclosure on a statutory footing by codifying the rule in *Halliburton v Chubb*. This would bring the EEA 1996 in line with the UNCITRAL Model Law (Article 12(1)), as well as the ICC (Article 11) and LCIA Rules (r. 5.5). It also has the benefit of promoting certainty: it ensures that the EEA 1996 recites in one place the principles governing arbitrator disclosure.

The reform places a concise test for arbitrator disclosure on statutory footing, which is consistent with international best practice. In this way, the reform clarifies the extent of disclosure required by arbitrators, which should both reduce the scope for challenge and reassure users as to the arbitrators' impartiality and aligns English law with international practices in other prominent seats including Paris and New York.

In Brazil, there is considerable uncertainty over the extent of disclosure arbitrators are required to make. The Brazilian Arbitration Act (Article 13) provides that an individual may only act as an arbitrator if he/she "is trusted by the parties" but the scope of disclosure that is required to comply

with this provision is unclear (see here). This lack of clarity has resulted in a controversial constitutional lawsuit known as "ADPF 1050" before the Brazilian Superior Court of Justice, and multiple challenges to awards (see here). Against this backdrop of uncertainty, the benefits of a concise statutory test for arbitrator disclosure proposed in the reform to the EEA 1996 is clear and advantageous.

3. **Summary Disposal of Claims**

The EEA 1996 does not currently contain an express provision for the summary judgment of claims or issues without a trial. Arbitrators are, however, under a statutory duty to give each party a reasonable opportunity to present their case. A failure to comply with that duty is a ground for challenging an award before the courts. The result is that tribunals in London-seated arbitrations have historically been reluctant to determine claims summarily, without a hearing, even where most major institutional rules (LCIA, ICC, SIAC, HKIAC and ICSID) expressly empower tribunals to do so. This has enabled parties with claims or defences that have no realistic prospect of success to delay the resolution of disputes and use so-called "guerilla tactics" to increase the time and cost required to obtain a final award.

The proposed reforms address this issue by making express provision for the summary disposal of claims or issues. The Draft Amendment bill provides that "*the arbitral tribunal may … make an award on a summary basis in relation to a claim, or a particular issue arising in a claim, if the tribunal considers that… a party has no real prospect of succeeding*." This proposed threshold for summary dismissal is the same threshold as in English court proceedings and, therefore, benefits from extensive case law explaining its meaning.

This reform is intended to give London-seated tribunals confidence to use summary dismissal procedures more frequently. This should, in turn, promote the efficient resolution of London-seated arbitrations by permitting issues (including, for instance, jurisdictional objections) that are manifestly without merit to be dismissed promptly, thereby saving time and costs. This reform, if implemented, would set London apart from seats like Paris, New York and Sao Paulo which do not have a have a similar statutory provision that puts a tribunal's right to dismiss claims summarily on a statutory footing.

Conclusion

In summary, the proposed reforms to the EAA 1996, if implemented, will ensure that the UK has a state-of-the-art arbitration legislation. In light of these reforms, Latin American parties engaging in business with parties coming from other parts of the world may find it advantageous to choose London as a seat in their arbitration agreements, if they are seeking a neutral forum.

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