RESPONSE OF THE CLLS ARBITRATION COMMITTEE IN RESPONSE TO THE

LAW COMMISSIONS CONSULTATION PAPER ON THE REVIEW OF THE ARBITRATION ACT 1996

In its consultation paper (number 257) the Law Commission asked for views on its proposals and for replies to its questions. This submission reflects the views of the Arbitration Committee of the City of London Law Society (CLLS). The CLLS represents approximately 17,000 City lawyers through individual and corporate membership, including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multijurisdictional legal issues. The CLLS responds to a variety of consultations on issues of importance to its members through its 19 specialist committees. The CLLS Arbitration Committee is made up of senior and specialist lawyers who have a particular focus on issues relating to arbitration and settlement of cases, and in supporting the role of London as one of the leading centres for arbitration in the world.

Given its role, in preparing this submission, the Arbitration Committee has been guided by two principles.

First, the international users of the arbitration system have many choices when it comes to deciding where to hold their arbitrations. This Committee wants London to be an obvious choice. In making that choice, international users will look at many factors, but one of the most important is the legislative framework that supports the use of arbitration. In England, this means that international users will look closely at the Act. They may not be English trained or common law lawyers. Therefore, we believe that the amended Arbitration Act needs, wherever possible, to be clear, easily understood by international users and steps should be taken to avoid undue complexity. The amended Act must also deal with issues that are of concern to users, such as confidentiality, impartiality and the role of the courts (especially the availability of appeals). The Act should wherever possible be self-standing : it should avoid relying on references to other legislation or principles of common law. We come back to this point below, for example where we look at the proposals as regards preventing discrimination.

Second, users of arbitration pay for using the system. They pay for the arbitrators, any arbitral institution, counsel and litigating in the English courts can be expensive, even with the “loser pays” principle. The Act should, therefore, seek to avoid complexity, or procedures, that lead to undue cost. We reflect our concern to identify “cost -v- benefit” in appropriate places in our response below.

There are many issues which the Committee has discussed and on which it is giving further thought. In the hope that this work will be helpful to the Commission, we shall supplement this response with the outcomes of those further reflections.

CONSULTATION QUESTION		DECISION
1.	We provisionally conclude that the Arbitration Act 1996 should not include provisions dealing with confidentiality. We think that confidentiality in arbitration is best addressed by the courts. Do you agree?	The committee considers that not addressing confidentiality explicitly would be a mistake; it is a prime reason for international parties choosing to arbitrate under English curial law and a major attraction for London when compared to a number of competing seats. We do not consider it tenable that the Act should remain silent on such an important element of arbitration in London. We consider that the Act should contain at least a statement of principle as to arbitrations being confidential under English law. As regards any concern for greater transparency in international arbitration, the parties may opt out as they wish and the investor/state position is appropriately addressed through the Mauritius Convention/UNCITRAL Rules on Transparency.
2.	We provisionally conclude that the Arbitration Act 1996 should not impose a duty of independence on arbitrators. Do you agree?	The Committee agrees with the proposal.
3.	We provisionally propose that the Arbitration Act 1996 should provide that arbitrators have a continuing duty to disclose any circumstances which might reasonably give rise to justifiable doubts as to their impartiality. Do you agree?	The Committee agrees with the proposal.
4.	Should the Arbitration Act 1996 specify the state of knowledge required of an arbitrator's duty of disclosure, and why?	The Committee agrees with the proposal for the reasons set out in the paper.

5.	If the Arbitration Act 1996 were to specify the state of knowledge required of an arbitrator's duty of disclosure, should the duty be based upon an arbitrator's actual knowledge, or also upon what they ought to know after making reasonable inquiries, and why?	In the opinion of the Committee, if the Arbitration Act 1996 were to specify the state of knowledge required of an arbitrator's duty of disclosure, the duty should be based upon what they ought to know after making reasonable enquiries for the reasons set out in the paper.

6.	Do you think that the requirement of a protected characteristic in an arbitrator should be enforceable only if it is necessary (as suggested by the Court of Appeal in *Hashwani v Jivraj*) or if it can be more broadly justified (as suggested by the House of Lords)?	The CLLS Arbitration Committee acknowledges the importance in arbitration and more generally of ensuring respect for diversity and equality and supports the important initiatives referred to by the Law Commission in para. 4.4 of the Consultation Paper. However, and approaching the question of whether the Arbitration Act should prohibit discrimination by adopting the language of the Equality Act 2010 from the perspective of international users of arbitration (including but not limited to States in connection with their international law obligations and as commercial actors), the CLLS Arbitration Committee has some reservations concerning the Law Commission's proposal, as described below. **The CLLS Arbitration Committee's collective experience** We preface these reservations with the observation that, in the experience of the CLLS Arbitration Committee, there are few – if any – arbitration agreements between commercial parties that contain offensively discriminatory provisions. In the experience of the CLLS Arbitration Committee, arbitration agreements contain restrictions as to nationality and, on occasion, characteristics that require an arbitrator to have a certain number of years' experience in a particular jurisdiction or in a particular market or type of work. If the broader experience is that parties choosing to arbitrate in England and Wales more regularly include egregious discriminatory or prejudicial provisions in their arbitration agreements, then the balance may tip in favour of the Law Commission's proposal. **The CLLS Arbitration Committee's reservations** 1. Risks concerning enforceability of the award outside the jurisdiction of the arbitration The primary concern of the CLLS Arbitration Committee is that the failure to give effect to conditions concerning the characteristics of the arbitrators contained in the arbitration agreement leaves the final award vulnerable to an objection to its recognition and enforcement. The Consultation Paper does address this risk but ultimately concludes that it is more important that the law in England and Wales takes a stance against discrimination. The CLLS Arbitration Committee's view is that the risk that an award is not recognised and enforced is understated and the balance tips in favour of minimising risks to enforceability, given the premise of arbitration as a method of dispute resolution is to result in a binding and enforceable award.

		The enforceability of the award under the New York Convention is of paramount importance to international parties when choosing to arbitrate their disputes. Any additional provision in the Arbitration Act that brings a risk to the enforceability of the award may therefore provide a convincing reason to seat the arbitration elsewhere. In particular, if a provision of the arbitration agreement is considered to be unenforceable (either by the tribunal or by the English court) but the arbitration agreement itself is enforceable, the parties will be compelled to arbitrate their dispute knowing that there is ultimately a risk that a court asked to recognise and enforce an award may decline to do so. The alternative, if an arbitration agreement contains a discriminatory requirement as to protected characteristics, is that the entire arbitration agreement is found to be unenforceable, and the parties' clear intent to arbitrate is frustrated. 2. Legitimate concerns about the characteristics of the arbitrator, in particular, nationality International parties regularly choose arbitration for its neutrality – they contract out of the jurisdiction of the national courts for the very reason that they want a neutral – or non-national - tribunal. For this reason, international institutional arbitration rules often contain provisions on nationality. Requirements as to, or restrictions on, the nationality of an arbitrator follow from the concern that an arbitrator who bears the nationality of one of the disputing parties may not, or may not be perceived to be, neutral. Concerns about neutrality are particularly observed in the context of state parties, both in investor-State arbitrations and when States or SOEs are participating in international commercial arbitration. In the context of arbitrations involving the State, and where public resources are ultimately at stake, it is often important that the arbitral process can be shown to the public as being credible, with a tribunal which is neutral in terms of its nationality being a ready hall-mark of this. Parties may also include criteria that requires an arbitrator possess the knowledge and experience of a specialist market in a particular jurisdiction, which criteria could be interpreted as impliedly imposing a nationality and/or age requirement. The ability to choose an impartial arbitrator with the characteristics or qualities best suited to resolving the dispute and/or satisfying parties concerns as to neutrality is an aspect of the principle of party autonomy that underpins international arbitration. In the event that the Law Commission's proposal is taken up in the Arbitration Act, such legitimate criteria, agreed between the parties, may be vulnerable to assessment by the court. In particular, the proposal – as described in question 7 below – would mean that an agreement concerning an arbitrator's protected

		characteristic is unenforceable, *unless* it can be shown that it satisfies a particular test (whether that test is "necessary" or "broadly justifiable"). In such circumstances, parties may be inclined to choose another seat, rather than take the risk that the requirement of a protected characteristic can be challenged. Further, if a non-discriminatory provision is included in the Act, it should recognise that it is legitimate for nationality to be considered as a relevant criterion when selecting arbitrators. 3. A reference to domestic equality legislation may act as a deterrent to parties from arbitrating in London International parties may be unfamiliar with the Equality Act and the inclusion of domestic legislation as a reference point may be confusing for international parties and give the impression that the framework provided by the Arbitration Act is not intended or less suitable for international disputes. Accordingly, such parties may be inclined to choose another seat of arbitration, to the disadvantage of London as an internationally recognised centre of arbitration. Finally, the CLLS Arbitration Committee also recognises the need for greater progress in increasing all types of diversity amongst arbitral appointments. However, based on our collective experience in the area of international commercial arbitration and investor-state arbitration, restrictions in the parties' arbitration agreement are not a contributing factor to slower than desirable progress in improving the diversity of arbitral appointments. Accordingly, it is unclear that the downsides of the proposal, in particular the risks to the enforceability of the award, can be justified by the policy reasons which are given to support its introduction. **Enforceable if "necessary" or if "broadly justifiable"** In the event that the Law Commission were to introduce its proposal into the Arbitration Act, the "broadly justified" test is to be preferred (we understand "broadly justified" to mean that the requirement of a protected characteristic is "a proportionate means of achieving a legitimate aim"), as it provides at least some scope for parties to select the arbitrator they think is best suited to determine the disputes that the parties anticipate may arise in the course of their relationship. The test of whether a protected characteristic is "necessary" places the threshold too high and it would be very difficult to satisfy this test where the agreement as to the protected characteristic concerns nationality in order to achieve neutrality and the perception of neutrality.

7.	We provisionally propose that: (1) the appointment of an arbitrator should not be susceptible to challenge on the basis of the arbitrator's protected characteristic(s); and (2) any agreement between the parties in relation to the arbitrator's protected characteristic(s) 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. "Protected characteristics" would be those identified in section 4 of the Equality Act 2010. Do you agree?	Please see answer to question 6, above. While the question of discrimination is an important one, the CLLS Arbitration Committee's view is that this matter should not be addressed in the Arbitration Act as proposed.
8.	Should arbitrators incur liability for resignation at all, and why?	Yes they should, if there are no reasonable grounds for resignation.
9.	Should arbitrators incur liability for resignation only if the resignation is proved to be unreasonable?	Yes, arbitrators should incur liability if the resignation is "manifestly unreasonable".

10.	We provisionally propose that arbitrator immunity should extend to the costs of court proceedings arising out of the arbitration, such as applications to remove an arbitrator. Do you agree?	The CLLS Arbitration Committee does not agree. The Court hearing any application should decide who pays the costs given the outcome of the application and offering an indemnity would be inconsistent with this approach.
11.	We provisionally propose that the Arbitration Act 1996 should provide that, subject to the agreement of the parties, an arbitral tribunal may, on the application of a party, adopt a summary procedure to decide a claim or an issue. Do you agree?	The CLLS Arbitration Committee agrees with an opt-out option. The Committee considers that the Law Commission's proposal deserves some comment. As a preliminary observation, the Committee considers that, in practice, the current provisions of the Arbitration Act are broad enough to permit an arbitral tribunal to adopt a summary procedure to decide an issue (eg, a claim or defence), in terms compatible with the Law Commission's proposal. Despite this, the Committee considers that the proposed amendment will not be superfluous. Arbitral tribunals, mindful of a potential setting aside or a risk of non-enforceability of an award, tread very carefully when it comes to procedural issues.[1] In this vein, many arbitral tribunals may not feel comfortable adopting procedures or mechanisms that may dispose of an issue (or a whole case) at an early stage if not expressly set out in legislation or, where applicable, institutional rules. Accordingly, the proposal, which the Committee understands will be on an opt-out basis, if adopted, is likely to encourage arbitral tribunals to dispose of unmeritorious issues early in the proceedings. The early disposal of unmeritorious issues, in turn, is likely to reduce the length and attendant cost of international arbitration, thus dealing with the two main criticisms levelled against this method of dispute resolution. Against this backdrop, the Committee considers that the proposal, if adopted, is likely to enhance the standing of London as an arbitral seat.

[1] Some voices refer to this risk averse stance to as "due process paranoia".

12.	We provisionally propose that the summary procedure to be adopted should be a matter for the arbitral tribunal, in the circumstances of the case, in consultation with the parties. Do you agree?	The Committee agrees with the proposal.
13.	We provisionally propose that the Arbitration Act 1996 should stipulate the threshold for success in any summary procedure. Do you agree?	The Committee agrees with the proposal.

14.	We provisionally propose that a claim or defence or issue may be decided following a summary procedure where it has no real prospect of success, and when there is no other compelling reason for it to continue to a full hearing. Do you agree?	The Committee agrees with the proposal, with comments. The Committee agrees with the Law Commission that there should be a test. The Committee further agrees with the Law Commission that a "no real prospect of success" test instead of "manifestly without merit" test (a higher test than the test of "no real prospect of success"), is preferable, for the following reasons: 1. There is a significant body of English case law in respect of the "no real prospect of success" test. By contrast, the "manifestly without merit" test is alien to English law. 2. A key benefit arising from this body of case law relates to predictability, a factor often considered by parties and their advisers when selecting a seat in an arbitration agreement (be that an arbitration clause or a submission agreement). 3. In addition, after a dispute has arisen, the relevant case law is likely to provide, at the very least, points of reference for the debate of the parties and the tribunal's decision. 4. What is more, a decision on an early disposal may be subject to review by the English Court. This could be the case in relation to decisions on jurisdictional issues under s 67 of the Arbitration Act or on the merits under s 69 of the Arbitration Act (if not contracted out). In those circumstances, the Committee considers that it would be more efficient for an English judge to deal with a well-known test in the jurisdiction rather than an alien one. 5. Lastly, the "manifestly without merit" test, due to its open nature, does not provide more guidance than the "no real prospect of success" test and therefore requires a significant inquiry on the part of an arbitral tribunal. Thus, on pure textual analysis, it cannot be said that the "manifestly without merit" test is superior.

15.	We provisionally propose that section 44(2)(a) of the Arbitration Act 1996 should be amended to confirm that it relates to the taking of the evidence of witnesses by deposition only. Do you agree?	The Committee agrees with the proposal.
16.	Do you think that section 44 of the Arbitration Act 1996 should be amended to confirm that its orders can be made against third parties, and why?	The Committee agrees with the proposal for the reasons set out in the paper.
17.	We provisionally propose that the requirement for the court's consent to an appeal of a decision made under section 44 of the Arbitration Act 1996 should apply only to parties and proposed parties to the arbitration, and not to third parties, who should have the usual rights of appeal. Do you agree?	The Committee agrees with the proposal.
18.	We provisionally conclude that the provisions of the Arbitration Act 1996 should not apply generally to emergency arbitrators. Do you agree?	The Committee agrees that the provisions of the Arbitration Act should not generally apply to emergency arbitrators and specific provisions for Emergency Arbitration should be dealt with in the relevant institutions' rules and not in the Act.

19.	We provisionally conclude that the Arbitration Act 1996 should not include provisions for the court to administer a scheme of emergency arbitrators. Do you agree?	Yes. The Committee agrees with the proposal.
20.	Do you think that section 44(5) of the Arbitration Act 1996 should be repealed, and why?	The Committee agrees with the proposal for reasons set out in the paper.
21.	Which of the following ways of accommodating the orders of any emergency arbitrator do you prefer, and why? (1) A provision which empowers an emergency arbitrator, whose order has been ignored, to issue a peremptory order, which, if still ignored, might result in the court ordering compliance. (2) An amendment which allows an emergency arbitrator to give permission for an application under section 44(4) of the Arbitration Act 1996. If you prefer a different option, please let us know.	The Committee agrees with option 2.

22.	We provisionally propose that: (1) where a party has participated in arbitral proceedings, and has objected to the jurisdiction of the arbitral tribunal; and (2) the tribunal has ruled on its jurisdiction in an award, then any subsequent challenge under section 67 of the Arbitration Act 1996 should be by way of an appeal and not a rehearing. Do you agree?	The Committee agrees with the proposal, for the reasons set out in the paper. However, the Committee notes that this was a difficult decision, with a minority of members strongly of the view that de novo review should be retained, and some members in the majority expressing their agreement to the Law Commission's proposal with some hesitation. The minority view is that de novo review provides a critical protection to parties who have not consented to arbitration, it is the standard of review in other leading jurisdictions such as Singapore, the system is not widely abused and inefficient, and any such abuse and inefficiency could in any event adequately be dealt with by the court's existing case management powers. The majority view however, which is ultimately the Committee's view, is that an appeals mechanism would be more attractive to users of arbitration than a full-rehearing. It would streamline the process for jurisdictional challenges and render it less open to abuse (some members were firmly of the view that parties do abuse the ability to request de novo review), whilst at the same time maintaining adequate safeguards for genuine jurisdictional challenges. It was felt that such an approach would give London a competitive advantage over other leading seats. However, some members of the majority noted that they had arrived at this position with some difficulty, and were sympathetic to the points raised by the minority.
23.	If section 67 of the Arbitration Act 1996 is limited, in some circumstances, to an appeal rather than a rehearing, do you think that the same limitation should apply to section 32, and why?	The Committee agrees with the proposal, for the reasons set out in the paper.
24.	We provisionally conclude that our proposed change to section 67 of the Arbitration Act 1996 would not require any similar change to section 103. Do you agree?	Yes. The Committee agrees.

25.	We provisionally propose that, in addition to the existing remedies under section 67(3) of the Arbitration Act 1996, the court should have a remedy of declaring the award to be of no effect, in whole or in part. Do you agree?	Yes. The Committee agrees.
26.	We provisionally propose that an arbitral tribunal should be able to make an award of costs in consequence of an award ruling that it has no substantive jurisdiction. Do you agree?	Yes. The Committee agrees.
27.	We provisionally conclude that section 69 of the Arbitration Act 1996 strikes the right balance between competing interests in respect of the ability to appeal an arbitral award on a point of law. We do not therefore propose any reform to section 69. Do you agree?	Yes. The Committee agrees to keep the status quo.

28.	Do you think that section 7 of the Arbitration Act 1996 (separability of arbitration agreement) should be mandatory, and why?	The Committee agrees that section 7 of the Act should be mandatory. If section 7 remains non-mandatory, the important principle of the separability of the arbitration agreement from the contract in which it is contained may be weakened as a result of the unintended consequences that have arisen from the Supreme Court's ("UKSC") decision in Enka v Chubb. The Committee considers that separability is considered a cardinal principle of arbitration across the world. Any weakening of that principle will lead to uncertainty and an increase in satellite litigation, all of which detracts from London's position as a leading seat for arbitration. The decision in Enka is troubling in the following two respects, because the UKSC held that (i) an express choice of the law governing the underlying contract will generally apply to its arbitration agreement, and (ii) a choice of foreign law for the arbitration agreement constitutes an agreement under section 4(5) of the Act to disapply all non-mandatory sections of the Act (which would include section 7), insofar as those sections address matters that are substantive as opposed to procedural. The UKSC specifically held in Enka that the principle of separability in section 7 is substantive, and would therefore be affected where a foreign law governs the arbitration agreement. The result of these developments is that it allows parties to revive arguments that the invalidity of the main contract (e.g. because of fraud or illegality) also invalidates the arbitration agreement contained within that contract, and that the arbitrators therefore lack jurisdiction. This argument would be available to a party that can demonstrate that the foreign law governing the arbitration agreement does not recognise the principle of separability. Many parties choose London as the seat of arbitrations where their contract is governed by foreign law. The Committee is concerned that as the law governing the arbitration agreement in these cases will now be that same foreign law, arguments impugning the arbitration agreement may be raised in a large number of cases. Until Enka, this issue was subject to the decision of the House of Lords in Fiona Trust v Privalov, to the effect that the separable arbitration agreement survives allegations that render the underlying contract invalid, save in exceptional circumstances (e.g. where a signature on the main contract has been forged and the arbitration agreement itself is said to be directly vitiated). Fiona Trust was considered a landmark decision and hailed by many commentators across the world. Enka takes English arbitration law back some 20 years, and will lead to an increase in jurisdictional challenges based on creative arguments under foreign law. The Committee considers that this would be a retrograde step, and would leave London as an outlier amongst

		the most prominent seats for international arbitration. The Committee believes that the best way to address this issue would be for a default rule to be inserted into the Act, to the effect that absent an express agreement as to the law governing the arbitration agreement, the law of the seat (English law) shall apply. However, if the Law Commission decides not to pursue that important reform, at a minimum, section 7 should become mandatory, thereby ensuring that the principle of separability applies to all London-seated arbitrations.
29.	We provisionally propose to confirm that an appeal is available from a decision of the court under section 9 of the Arbitration Act 1996. Do you agree?	The Committee agrees with the proposal.
30.	Do you think that an application under section 32 of the Arbitration Act 1996 (determination of preliminary point of jurisdiction) and section 45 (determination of preliminary point of law) should merely require either the agreement of the parties or the permission of the tribunal, and why?	The Committee agrees with the proposal.
31.	Do you think that the Arbitration Act 1996 should make express reference to remote hearings and electronic documentation as procedural matters in respect of which the arbitral tribunal might give directions, and why?	We do not think that express reference should be made. Any provisions could become quickly outdated; Arbitrators, parties and the institutions are better placed to address these issues.

32.	Do you think that section 39 of the Arbitration Act 1996 should be amended to refer to "orders" (rather than "awards"), and why?	The Committee agrees but it should be "awards or orders" to cover both.
33.	Do you think that section 39(1) of the Arbitration Act 1996 should be amended to refer to "remedies" (rather than "relief"), and why?	Yes, in order to achieve consistency.
34.	We provisionally propose that section 70(3) of the Arbitration Act 1996 should be amended so that, if there has been a request under section 57 for a correction or additional award material to the application or appeal, time runs from the date when the applicant or appellant was notified of the result of that request. Do you agree?	The Committee agrees with the proposal.
35.	We provisionally conclude that section 70(8) of the Arbitration Act 1996 (granting leave to appeal subject to conditions) should be retained as we consider that it serves a useful function. Do you agree?	The Committee agrees with the proposal.
36.	We provisionally propose that sections 85 to 87 of the Arbitration Act 1996 (on domestic arbitration agreements) should be repealed. Do you agree?	The Committee agrees with the proposal.

37.	Do you think that any of the suggestions discussed in Chapter 11 needs revisiting in full, and if so, why?	Yes, we believe that the law governing the arbitration agreement requires revisiting in full. Further, we agree with the suggestion in paragraph 11.8 of the consultation paper that the Act should be amended to expressly provide for a default rule that the law governing the arbitration agreement should be the law of the seat, unless the parties have expressly agreed otherwise. We do not agree with the implication in paragraphs 11.8 to 11.12 of the consultation paper that the decision of the majority of the Supreme Court in Enka v Chubb is sufficiently clear. To the contrary, the decision leaves room for argument as to the law which governs the arbitration agreement. For example, we expect disputes to arise as to whether the parties have impliedly selected the law applicable to the contract, for the purposes of the first rule established in Enka. In any event and regardless of whether or not the Supreme Court's decision in Enka is clear, the consequences of that decision as regards the law governing the arbitration are of concern. The Supreme Court's decision as to the nature of the test for determining the law of the arbitration agreement and its interpretation of Article 4(5) of the Act allows parties to raise creative foreign law arguments which would disrupt the arbitration. For example, arguments as to the scope of the arbitration clause, its separability and issues of arbitrability. Where parties specify that their arbitration shall be seated in London, they expect that English law will apply to these issues. However, following Enka, there can be argument, and accordingly uncertainty, as to the applicable law. There is therefore currently a lack of clarity in this area of the law. Accordingly, and regardless of whether the decision in Enka v Chubb is right or wrong, the inclusion in the Act of a clear default rule as described above would enhance legal certainty and clarity. Our preference is for the default rule to be for the law governing the arbitration agreement to be the law of the seat, since it makes more sense for the law governing the arbitration to be the law of the seat rather than, for example, the law chosen by the parties to govern their substantive rights and obligations. Such approach would also align with, for example, the approach taken in Art 16.4 LCIA Arbitration Rules 2020.

38.	Is there any significant topic within the Arbitration Act 1996, not addressed in this consultation paper, which you think is in need of review and potential reform? If so, what is the topic, and why does it call for review?	We will write separately with ideas for further topics or issues or potential areas of reform.