HOUSE OF LORDS

Special Public Bill Committee

Corrected oral evidence: Arbitration Bill

Friday 9 February 2024

10 am

Watch the meeting

Members present: Lord Thomas of Cwmgiedd (Chair); Lord Hacking; Lord Haselhurst; Lord Marks of Henley-on-Thames; Lord Ponsonby of Shulbrede; Lord Roborough; Lord Smith of Hindhead.

Evidence Session No. 1 Heard in Public Questions 1 - 13

Witnesses

I: Professor Sarah Green, Law Commissioner for Commercial and Common Law, Law Commission of England and Wales; Lord Bellamy KC, Parliamentary Under-Secretary of State, Ministry of Justice.

USE OF THE TRANSCRIPT

1. This is a corrected transcript of evidence taken in public and webcast on www.parliamentlive.tv.

Examination of witnesses

Professor Sarah Green and Lord Bellamy.

Q1 **The Chair:** May I welcome everyone to the first oral evidence session of the Arbitration Bill Special Public Bill Committee? We are live and broadcasting on parliamentlive.tv. Today, evidence is being given by Professor Sarah Green, the Law Commissioner responsible for the report and the draft Bill, and by Lord Bellamy, a Minister from the Ministry of Justice, who is also a member of the committee but will be giving oral evidence today.

We will proceed to those questions in a moment. There may be issues arising out of them that we cannot deal with today. It would be entirely appropriate for any further matters to be communicated to us in writing by those giving evidence, or we can consider other ways of getting evidence on certain points, because some of this is, one might say, a little technical.

I will ask the first question, but the most important thing is that each of us before speaking will declare our interests. I have interests in that I practise as an arbitrator. I am president—a purely nominal job—of the Reinsurance and Insurance Arbitration Societies of the United Kingdom. I am president of the London Shipping Law Centre and president of the Qatar International Court and Dispute Resolution Centre.

Professor Green, I will begin with a question to you. Could you please set the scene, for members of the committee and, more importantly, those who may be watching on parliamentlive.tv, of how arbitration fits into the broader landscape of dispute resolution?

Professor Sarah Green: Good morning. Arbitration is a dispute resolution mechanism and it is one that parties choose. When they enter into an agreement, they can elect to have any disputes resolved by arbitration. There are very many types of arbitration, as I am sure will come up later in discussions this morning. The defining characteristic is that an independent, impartial, non-governmental party decides, according to adjudicative procedures, how to resolve those disputes. That is probably the main common feature of these disputes.

It is also worth pointing out to anybody who does not realise it that this is a huge part of dispute resolution across the world, but particularly in England and Wales. It is a system that runs almost in parallel to the litigation system that people do tend to know about. I say "almost in parallel" because courts can intervene at the end of that process in certain circumstances. We have these two means of dispute resolution and it is a huge part of what England and Wales provides.

I should say that these figures are very difficult to come by, because arbitrations are not recorded in the same way that court judgments are. They are often confidential. That is part of what can be attractive about them, although they are not always. We estimate there to be around 5,000 domestic and international arbitrations in England and Wales. It is

around £2.5 billion worth of work and process that goes on in this jurisdiction. It is also worth saying that that does not occur in a vacuum. That has ripple effects through other areas, so legal, banking, insurance and trade. It is, as I hope I am emphasising, an incredibly important part of our dispute resolution system. It is also worth pointing out that England and Wales is the preferred seat of arbitrations across the world.

Q2 **The Chair:** Could I ask you in very general terms to explain the purpose of the Bill, the reasoning behind it and the main problems it is intended to address?

Professor Sarah Green: At the moment, arbitrations in England and Wales come under the Arbitration Act 1996. At the point when we were commissioned to begin this project, the Arbitration Act 1996 was 25 years old. It is now nearly 28 years old. It has been clear throughout the entirety of that project that the Arbitration Act 1996 is a Rolls-Royce, in terms of its being a gold standard globally, as I said, as a preferred seat of arbitration. Even a Rolls-Royce, after 25 years on the road, needs finetuning and tweaking in some ways.

I suppose that you could say that the process that we have been engaged in is a sort of legislative MOT, or I should probably say MoJ. That is really what this process has been about. It was very clear to us from the beginning when we engaged with stakeholders that this was something that was just fortified in our minds. The Arbitration Act 1996 was never supposed to be root and branch reform. It works incredibly well in the main. We were trying to make sure that, after 25 years, it was still fit for purpose. Also, once a statute has been used for at least a quarter of a century, tested and, to extend the analogy, road-tested, we get to know, as do courts and arbitrators, those bits that could do with a bit of attention.

There is one thing that has been very clear to me as a Law Commissioner over the past few years. Because I deal with commercial law, and of course commercial law in general is a very valuable thing to this jurisdiction, I am always very concerned about trying to fix a small problem with an area of law that works very well and then, in doing so, causing more problems elsewhere, and trying to fix parts that are not broken and therefore creating more problems. With this Bill, we are trying to do laparoscopic legal surgery. We are trying to just go to the finer points that we think could be improved and do that.

Q3 **The Chair:** Could I ask you to illustrate that by reference to one matter that the committee may have to consider? That is the issues that have arisen, in very general terms, as regards confidentiality and allegations of corruption of that kind. Can you, in very general terms, explain the view that the Law Commission took on that?

Professor Sarah Green: The way that the Law Commission works, by the way, for anybody who is not familiar with it, is highly consultative. We do not sit in our building and pronounce on what we think are the best ways for the law to change. We consult at every stage of the

process. In fact, in this project we conducted two consultations. The normal practice is to conduct a consultation, analyse the consultation responses and then produce a report and perhaps a Bill. With this project, as I said, we actually did two consultations because more issues came up and we never want to make any sort of proposals or recommendations without that consultative background. We even consult before we get to the consultation paper.

The reason I have said all of that is that, when we first began this project, one of the many points that were initially suggested to us was to consider making confidentiality a codified and therefore concrete principle of the Arbitration Act. We consulted on that. We spoke to many stakeholders, and when I say stakeholders here we are talking about users of arbitration, so lawyers, arbitrators, judges and insurers. We listen to as wide a range of people as we can. I should say in this project that the stakeholders have been particularly helpful and incredibly communicative and generous with their time, so we are very grateful for that. We also spoke to members of the DAC who put together the 1996 Act.

Confidentiality was one of those points about which there was quite a lot of disagreement, because of course parties can choose to make their arbitrations confidential. That is absolutely open to them. The problem with putting it into the Act and therefore ossifying it as a principle, even if it was something that could be opted out of, is that, as I have already mentioned, arbitrations are of very different types. While it is certainly true that some parties like arbitration because of the potential for confidentiality, which of course sets it apart from litigation in court, there are other arbitrations that start from the position of transparency, so investor-state arbitrations for instance.

Given that there is that spectrum of starting positions, after a lot of consultation, conversations, weighing up the options and adding in what I have already said—that we were taking the approach in this Act that we would only change those things where we were strongly persuaded that there needed to be a change—we decided that confidentiality was not something that would work well in statutory form, given that parties can always choose to make their arbitrations confidential. That is one point.

The other point was about the practical challenges involved in actually drafting a confidentiality clause, particularly given what I have said about different types of arbitration and the different sources of confidentiality in law. There are different types that emanate from equity and tort. Is it about the misuse of private information? Is it about the relationship that you have with a particular party? We realised that trying to put that in the Act would probably fall foul of our rule of not changing anything unless it was absolutely clear that it would make the Act better, rather than more complicated and less user friendly.

Q4 **Lord Hacking:** On the confidentiality issue, I do not think you are able to consider the Federal Republic of Nigeria case. Indeed, we have the chairman of that arbitral tribunal sitting with us. Is there any view in the

Law Commission? Has the Law Commission looked at that case? Has the Law Commission thought that perhaps confidentiality should be revisited as a result of this case? I am referring of course to the judgment of Mr Justice Robin Knowles.

Professor Sarah Green: We did not have a chance to look at that case as part of the main consultation because, as you know, that was decided afterwards, but we are familiar with it and have had a chance to think about it. In terms of my reading of that case and the internal conversations we have had since then, I do not think it would have made any difference to our conclusion on confidentiality. Of course, that was not an arbitration that was seated in England and Wales, but that is not really the point, I suppose, because it could have been.

The nature of corruption is that, by definition, it is not facilitated by the law and happens regardless of what the law says. Particularly given that the corruption in that case—I am very conscious that I am sat next to somebody who knows the facts of it very well—was so complete that the arbitrators were not aware of it, it is difficult to see how we could have drafted a confidentiality clause in this Act that would have prevented that or even given a remedy that was any different to what happened in the result in that case.

One thing that we discussed, given that that is probably the case and certainly our view at this stage, is what else could be done to ameliorate a situation such as the one in that case. One solution suggested by Nathan Tamblyn in my team is that that could be dealt with through codes of practice, perhaps developed by the Chartered Institute of Arbitrators, that work in an analogous way to those professional standards to which barristers are already subject.

That was quite a long answer to your question, but we are certainly aware of that case. I do not think it would have made any difference, given the drafting analysis we had already undertaken.

The Chair: I asked you that by way of illustration. It is a subject we may at some future stage come back to, but thank you very much.

Q5 **Lord Smith of Hindhead:** I have no interests to declare here, but I wonder whether Professor Green, and perhaps Lord Bellamy, might like to make a contribution. I have a very non-technical question, which is probably a very good thing. I would like to know and understand what you hope will be the benefits of this Bill and how it will impact on the UK and London as locations of the arbitration market. I say that in particular, because a moment ago you mentioned that the business is worth about £2.5 billion. There is a lot at stake here, and I think the committee would be interested to know your view on those two points.

Professor Sarah Green: I have already mentioned that at the moment London is the preferred seat of arbitration, but in 2021, for the first time, we were not solely first but joint first with Singapore. As I said, it is quite difficult to get accurate statistics for how many arbitrations happened.

The point is that, according to that report in 2021, we have, it seems, been matched for the first time.

There are other growing arbitration jurisdictions around the world, several of which have in recent years updated their arbitration legislation, conducting a similar project to what we are doing here. Singapore is the obvious one that always springs to mind. I think it updated its legislation in 2023, Hong Kong in 2022, and Sweden and Dubai in 2018. These are all jurisdictions that the world takes notice of.

There are two reasons why we are engaging in this fine tuning of the 1996 Act. One is substantive and I have already covered the reasons for that, or at least some of them. The other is, no question, symbolic, but with that substance behind it. We want to make it very clear as a jurisdiction that we are not complacent but we are aware of global movements and initiatives elsewhere. We want to make sure that our Rolls-Royce stays as effective as it can be. We are very much hoping that this will make it very clear and publicise the fact that London as a seat, and England and Wales as a jurisdiction, for arbitration is as modern and accessible as it can be.

Lord Smith of Hindhead: It is a full service and an MOT.

Q6 **The Chair:** I wondered whether the Minister wanted to comment and, before he comments, whether he had any interests he wanted to declare.

Lord Bellamy: As far as interests are concerned, I am a non-practising barrister. In my previous career, I occasionally participated in arbitrations as counsel, expert witness and arbitrator. Could I take this opportunity, since it is my first opportunity, to congratulate the Law Commission on the thoroughness of its report and its two consultations? Unusually, this was a case of two consultations. Such is the detail and the thoroughness of that report that the Government felt particularly confident that they could rely on it as a basis to bring this Bill before Parliament. As the committee will have seen, this Bill has arrived before Parliament in very quick time following the Law Commission's report as a result of the quality of its work.

I support entirely the remarks that Professor Green has made about London and the importance of the London market for dispute resolution. It is the Government's determination that London should remain best in class in world terms. We have been there for many years but, as Professor Green has pointed out, there are other very vibrant and challenging jurisdictions across the world. It is important that, in this broad range of work, London remains at the forefront. That is a particular reason for the Government bringing this bill forward.

I should add that it is not just the legal sector that provides the arbitration services here. Indirectly it is also many other aspects of London as a global commercial and financial centre that is supported by this kind of legal framework, whether it be the commodity markets, the shipping markets, the financial markets, the insurance markets or

international trade, in which London remains a very prominent centre. All those aspects are extraordinarily important to the economy and to the national interest. For those reasons, the Government think that this Bill is an extremely important measure to lay before your Lordships' House.

Lord Hacking: I do not want to ask a question now. I want to apologise for asking a question without declaring my interests. I have consulted the House of Lords registrar of interests and the advice that he gave was that nothing that I am about to declare needs to be put in the House of Lords registry, but I should declare it in this committee. Other than a fairly long career in the law and acting from time to time on arbitrations as counsel, from the year 2000 to 2020 I was an associate member of Littleton Chambers in London, acting as an arbitrator in numerous arbitrations and signing over 400 awards, either as sole arbitrator or co-arbitrator. The arbitrations were nearly always conducted under the main institutes: the LCIA, the ICC and so forth.

Also, I have written a number of articles. That is always rather important and is examined before you are appointed as an arbitrator. As far as I know, none of the articles I wrote in any way reflect on what this committee is about to consider. I was accredited as a fellow of the Chartered Institute of Arbitrators and accredited to the rank of chartered arbitrator.

Finally, although I am now retired from Littleton Chambers, I attended a conference on this Bill about two or three weeks ago. I was there in a listening role to see what was said, but members who were attending that session notified me that they were going to make a submission to this committee. They very properly did not discuss that submission with me, and I, vice versa, did not discuss it with them. It now has appeared among the many papers. It has the ARB number of 18 on our list. It is on page 89, and it is a submission from Louis Flannery, who is King's Counsel and heads up Mishcon de Reya's arbitration division. The other writer of this submission is Rupert D'Cruz, who is King's Counsel in my old chambers.

The Chair: That will be seen when the committee decides to make everything public.

Q7 **Lord Ponsonby of Shulbrede:** I have nothing to declare. The draft Law Commission Bill extended to England and Wales, while the government Bill extends to Northern Ireland. Why did the Law Commission Bill not extend to Northern Ireland, and why do you think the government Bill extends to Northern Ireland?

Professor Sarah Green: That is a very easy procedural one for me to answer. It is simply that, as the Law Commission of England and Wales, we are entitled to make recommendations only for England and Wales, but the Arbitration Act 1996 extends to Northern Ireland. We were very hopeful that the Government would make it so for anything that comes out of this Bill as well, so we are very pleased that that has been the result. That was simply something that we are not able to do. I do not know whether Lord Bellamy wants to add anything.

Lord Bellamy: Perhaps in reply to the noble Lord Ponsonby I could say exactly that. The Government's view is that this Act should apply to Northern Ireland as the existing 1996 Act does. Fortunately, we now have a restored Executive in Northern Ireland, so we will seek a legislative consent Motion from the Northern Ireland Assembly in due course.

The Chair: From these more general questions we move to something slightly more technical. By way of preface on the more technical issues, it may be necessary for us to look at it today at a higher level and come back to you on the more detailed technical points.

Q8 **Lord Marks of Henley-on-Thames:** I have interests to declare. I am a practising barrister, practising from chambers at 4 Pump Court. I frequently appear as an advocate in arbitrations, both domestic and international, both seated in London and seated elsewhere. I have held a qualification as an arbitrator for some years, being a fellow of the Chartered Institute of Arbitrators. Although I have never to date sat as an arbitrator, I have found it very useful in my practice as advocate at arbitrations.

Moving on to the more technical side, I dare say you have read the report of the Second Reading debate in the Grand Committee room, the Moses Room. Some speakers have commented on the drafting of Clause 1(2) of the Bill, which you will know adds new Section 6A to the Arbitration Act 1996. In particular, new subsection (2) of 6A was the subject of considerable debate and some disagreement. The general question that we seek your views on is whether the drafting of the clause concerning the law applicable to an arbitration agreement is sufficiently clear. My understanding, and this was alluded to by the Lord Chair, is that you have not had an opportunity to read the evidence that has been submitted but not yet been made public. We take the view that it is fair that you should do that before you reach a final view on these issues.

It may be helpful if I set out for this question the sorts of possibilities that there are. The first is to leave new Section 6A as drafted in the draft Bill.

The second is to delete the words "of itself" in 6A(2). You may remember where they come, but perhaps I could read it: "For the purposes of subsection (1), agreement between the parties that a particular law applies to an agreement of which the arbitration agreement forms a part does not, of itself, constitute express agreement that that law also applies to the arbitration agreement".

The third is to delete Section 6A(2) altogether. That is something on which Lord Hoffmann expressed a view in Second Reading. There has been some suggestion that we should stipulate in 6A(1) that the law that the parties expressly agree applies to the arbitration agreement should be expressly agreed in the arbitration agreement itself. That is not something that you took the view should apply.

The fourth is that there have been suggestions that there be a complete redrafting of 6A, some radical and some not so radical.

Those are the areas that we invite you to consider. I have one more

supplementary question, but perhaps you can answer the questions so far in general terms and, as the Lord Chair put it, at a higher level.

Professor Sarah Green: I can certainly explain why the drafting currently in the Bill is as it is. You will not be surprised to learn that we consulted on this. We did so a couple of times. We had many conversations and some stakeholder entire events about this point. That is entirely right, because it is, of course, incredibly important. The whole reason for putting this into the Bill is to provide clarity, so that is our ultimate and paramount aim.

For anybody who does not know this, we do this in the Law Commission with our in-house seconded parliamentary counsel. I am not let loose on the drafting. It is done by parliamentary counsel, who are instructed by my team. We tell them where we want to get to, an alchemy occurs, and they come out with words that sound like they should be in a statute. That is exactly what has happened here.

It is fair to say that we had several drafting suggestions made to us in the consultation process, a couple of which were similar to what we have just heard about having a choice of law clause for an arbitration agreement in the arbitration agreement itself.

First, I will say why we have done what we have done, and then I will explain why we did not take that particular suggestion on board when we heard it during the consultation process. As I said, we want clarity. The new suggested Clause 6 starts by making it very clear that this is about party autonomy. They should be free to choose the law that governs their arbitration agreement. That is all well and good as long as they do that, make it express and say that very definitely that law should apply to the arbitration agreement.

As we all well know, that does not always happen. Sometimes there will be a choice of law for what is called the matrix contract, the contract that goes alongside—that is probably the best way of putting it—the arbitration agreement. It will not always be clear whether that choice of law goes beyond the law for the contract and applies to the arbitration agreement also. It is very common in practice for there to be different laws governing the two.

We start off with that premise. It is up to the parties to choose that, but what happens where that has not been the case? Section 6A(2) is there to ensure that there is no doubt about what the first part does. Unless that choice of law is expressed specifically to be in relation to the arbitration agreement, it is not enough to express a choice of law for the matrix contract.

Why is "of itself" in there? I think that is the part that sounds closest to the very technical legal language that some people expect of statutes, but there is a good reason for that. It was thought about in great detail before it was suggested. It was to deal with a situation where there was a clause that specified the law that should govern the matrix contract. As

we now know from what is drafted in the Bill, that is not enough, so it makes it very clear that that is not necessarily enough to cover the arbitration agreement. That could of course be followed by another clause that says that that choice of law for the matrix contract applies also to the arbitration agreement. If you did not have "of itself", that first clause would not be able to work in that way. I am aware that you wanted to stay at a high level, so I will leave that there.

As I said, we heard a couple of times during the consultation the suggestion of requiring parties to put that choice into the arbitration agreement itself. We did not adopt that process, although we did at one stage in the consultation and we consulted on it, because there was a lot of disagreement about that being the best way to proceed. We also decided that that would not cover situations where, for instance, the express choice of law for the arbitration agreement was contained in the matrix contract but was still express and it was still very clear that it should apply to the arbitration agreement, albeit that it is in a different document.

If the statute required that choice to be in the arbitration agreement, it would not cover situations of incorporation. This is sort of the same point but a specific example. Where parties agreed after the event where arbitration was to occur, it would not be covered by that because that would not be in the arbitration agreement itself. Again, in the interest of returning to the higher level, we came to the conclusion, after consultation and discussing it with parliamentary counsel, that requiring that choice to be in the arbitration agreement itself would be too restrictive.

Q9 **Lord Marks of Henley-on-Thames:** That is enormously helpful. I have another point that I would ask Professor Green to consider, which is slightly separate. It concerns retrospectivity, because, with the substitution of new Section 6A, the law of the arbitration agreement may change after the arbitration agreement is entered into from being the law of the matrix contract, as you have called it, to the law of the seat of the arbitration. This is the effect of Clause 17(4)(b), the retrospectivity point.

The view has been expressed by some people that that offends against the principle against retrospection. Some have described it as uncommercial and uncertain as a result. As against that, Lord Bellamy, for the Government, has argued, supported by others, that it is important to balance the avoidance of a dual system whereby arbitration agreements can persist in dictating the law of the arbitration alongside the law of the seat, introduced by the new rules. Could you explain the view that the Law Commission took on this point in particular and on the question of retrospection in general?

The Chair: Maybe we could have Lord Haselhurst's question on this, which is probably for the Minister first, and then the chair of the Law Commission could reply. Would you like to ask your question now, Lord Haselhurst?

Q10 **Lord Haselhurst:** I should first make it absolutely clear that I have no interest. The register will show that I am chair of the West Anglia interest group, which is a wholly unremunerated position. Could I therefore add the extra question for the convenience of the committee and ask why the government Bill should differ from the Bill proposed by the Law Commission: namely, that changes to the law apply to all arbitration agreements, whenever made, except those where arbitrations have already commenced?

Lord Bellamy: The essential point here is that, in relation to new Section 6A, the original version of the Bill as published by the Law Commission provided that the new default rule about the law governing the arbitration agreement should apply only to arbitration agreements entered into force after the coming into force of the Act. The Government, on the publication of the Law Commission's report, received numerous representations from stakeholders to the effect, as Lord Marks has pointed out, that this meant that we would for many years have dual regimes, one for arbitration agreements that have come into force after the coming into force of the Act and the other for arbitration agreements existing before the coming into force of the Act.

Of course, there are very many such arbitration agreements. It would, in the Government's view, be a complicated and very difficult to manage situation unless we had one clear rule for all such circumstances. The Government took the view that it should follow the precedent of the 1996 Act and, as I understand it, the 1934 Act and indeed the 1883 Act, which have, generally speaking, provided that the changes in those Acts should apply to existing arbitration agreements, even though that meant some change in the law. It is a policy decision on behalf of the Government. Of course, it does not override a situation in which the parties have already chosen expressly the law governing the arbitration agreement. It provides only a default rule in case that is not expressly agreed. That, in general terms, is the Government's thinking.

The Chair: Now, having heard the Minister's view, you can answer Lord Marks's question.

Professor Sarah Green: There is obviously the point that that is what previous Arbitration Acts have done. There is definitely a balancing act on this one. Given that some arbitration clauses—particularly those concerning rent reviews, for instance—can be in place for many years, if we did not do it this way, the dual system of some arbitrations being under the 1996 Act and some being under the modified version would go on for a very long time.

In specific reference to the point about choice of law, our view on that in substantive terms was that the whole point of this reform, as I hope I have made clear, is to provide certainty in relation to what parties, at least in some situations, think they are doing when they are choosing a law to govern the arbitration agreement. In that area, certainty is currently lacking. The argument that parties will have relied on a

particular legal rule working is obviously less strong where that legal rule does not give certain and definite results.

Although I absolutely concede that it is a balancing mechanism and that there will of course be parties that have made it very clear, providing certainty is enough of a benefit to outweigh the costs of that—or the potential costs, I should say. If parties have made it clear, it will not make any difference anyway. In short, the certainty that this change provides will outweigh, I suppose, the potential disadvantages of something having retrospective effect.

Lord Marks of Henley-on-Thames: I will leave it there, because we can come back to this.

Q11 **Lord Hacking:** This is an important question that relates to Clause 1 of the Bill and to proposed new Section 6A to the Arbitration Act 1996. Professor Green, I do not think you will have seen this. It is an article in the *New York Law Journal* by an English arbitrator based in New York called John Fellas. Having recited 6A, he goes on to say, "What this means is that if parties include an arbitration clause in their contract providing for arbitration in London, and they also include a clause providing that their contract is to be governed by the law of, say, New York, English law will displace New York law as the law governing the arbitration clause".

Clearly that would have a major impact on the bringing to London of arbitration. As you will be aware, the common feature of an arbitration clause is to name the governing law for the contract, the matrix law, and to add that the seat of the arbitration will be X. I do not know whether you feel able to answer that question now or would like time to consider it.

Professor Sarah Green: What is the question? Is it whether it is problematic that our proposed modification would displace the parties' choice?

Lord Hacking: The parties' choice of governing law is, in this example, New York. The seat of the arbitration is named as London. The point that John Fellas is making is that the seat of the arbitration law will displace the written governing law of the contract.

Professor Sarah Green: That is only if parties have not made it express that that governing law also applies to the arbitration agreement. In that case, under the modifications that we are proposing, if they have expressed a choice of law that is specific and limited to the matrix contract but they have chosen the seat as being England and Wales, our modification will indeed work so as to make the governing law of the arbitration also England and Wales. The obvious thing that they can do to get round that is to be express and to say that, even though the seat of the arbitration is England and Wales, the governing law can remain that of New York.

This is another balancing analysis about party autonomy. Whichever way you look at it, where parties have not made it absolutely explicitly clear that they want one governing law for a contract and one governing law for an arbitration agreement, there is always a potential for the law to end up being one that they had not intended. We are taking a choice to fall one side of the line—"If you don't choose, it will go with the law of the seat"—rather than the other side of the line. It is clear that, whichever rule you apply, there is a potential for the parties' subjective choice not to be what manifests itself ultimately.

Lord Hacking: That is a rather serious consequence, is it not?

Professor Sarah Green: It is a serious consequence whichever way it goes.

Q12 **The Chair:** Maybe, Professor Green, you could look at the article in question and we can deal with that in further written evidence, or we can ask you to favour us with coming back to explain these questions if necessary. Thank you very much.

Can I move to the last area we expressly wanted to ask you about? That relates to the question of the court's role in deciding whether the arbitrators have jurisdiction over the matter in question. So that the issue that has arisen is more broadly understandable, could you explain very briefly the background to this and the role that the courts play, and expressly explain the term "bootstrapping"?

Professor Sarah Green: Section 67 of the current 1996 Act gives parties the ability to get the courts to decide on the jurisdiction of the arbitration tribunal. This was a point that we heard a huge number of submissions on. It is probably fair to say that stakeholders felt very strongly about this, even more than governing law, probably because to some extent it goes to the very core of what an arbitration is about.

There is a principle enshrined in Section 30 of the Act of competence-competence, which is an abbreviated way of saying that an arbitration tribunal has the competence to rule on its own competence. It can get a little self-referential. If a party disagrees that an arbitration tribunal has jurisdiction to decide on its particular dispute, or a part of that dispute, it can get the court to make that decision. The conceptual problem—it is not a problem with the Act specifically—is that an arbitration tribunal can rule on its own jurisdiction. The question for the court in deciding whether that is right is how much weight—I will avoid the word "deference" for now—should be given to the tribunal's own examination of the issue.

When we started this consultation, we were told by some stakeholders that the current position, which enables a court to do a de novo rehearing—reopening the whole process from the start and coming to its decision about jurisdiction that way—has led in practice to incredibly costly procedures, as you might imagine when you are replaying an entire process. Also, that enables parties, if they so choose, to use the arbitration tribunal, if you will, as something of a dress rehearsal to test

out their submissions and then, in front of the court, to have a second bite of the cherry and maybe do it a different way to try to get to the conclusion that they want. There are questions about whether they have an incentive in the first place not to use their best arguments, but that is what we heard from some stakeholders.

We heard from other stakeholders that it was not such an issue in practice and that it was very important for courts to retain the ability, should they so wish and should the circumstances suggest, to open it again and to do it from scratch. It is regarded as a strength of arbitration in England and Wales that that is an available course of action.

This was a very difficult point, because we had such strong, expert and well-experienced voices on both sides of the fence on this one. It may have been a sectoral issue and in some sectors of arbitration more of a problem in practice than in others. I do not know, but that is how it was presented to us. This was one reason why we did a second consultation, because it also came to our attention that we had originally said, "That all sounds very costly and a bit like we are giving parties a second bite of the cherry, potentially". We initially proposed that that hearing in front of the court should be more like an appeal, so not a rehearing but just a truncated form of looking at what the arbitration tribunal had decided and the merits of that. It was then brought to our attention that phrasing it in that either/or way was probably not very helpful.

Again, we come back here to a real balancing exercise. We want the courts to be the final arbiter of whether a tribunal has been properly constituted and has used its jurisdiction. If you take competence-competence too far, an arbitration tribunal is able absolutely to decide its own jurisdiction and what it has done. That would be an example of what is called bootstrapping, where they are completely left to their own devices in those terms. Maybe that is what the arbitration tribunal wants, but nobody else in the system really wants it.

There needs to be a proper system of court supervision and checks and balances on what an arbitration tribunal can do. After extensive consultation with judges and arbitrators, we came up with what we think is a way of achieving that balance. It is that, rather than setting it in the statute as a full rehearing or simply an appeal, handing it over to the courts and the Civil Procedure Rules and basically beefing up their case management powers, which of course are already there: the courts are already able to decide to some extent what they hear and what they do not hear.

That is the background to why we came up with the idea of dealing with this issue through case management powers rather than making it an absolute, "It's a complete rehearing or it isn't".

The Chair: You have obviously read what Lord Mance said in the Second Reading debate about the fundamental principle of the courts being the ultimate arbiter. This does not affect that at all.

Professor Sarah Green: We do not think that. I remember Lord Mance saying that it is very important to strike a balance. I think that is how he started his submission, and that is absolutely what we were trying to do with this. It was never, and still remains absolutely not, our intention to reduce the courts' power to ensure that arbitrations and arbitration tribunals behave within the parameters of their jurisdiction. As I said, we think this is the best way of achieving that balance without risking the disadvantages that I mentioned of excessive costs and dress rehearsals of hearings.

Q13 **The Chair:** I have one final question on this. We may come back to this again, because there are a number of submissions about this issue that you have not seen. Does the court in drafting the rules have sufficient flexibility to do what it wants? Does the Act properly telegraph the limitations, if any, on that power?

Professor Sarah Green: We put this together and are satisfied with the drafting as it currently is. We consulted fairly widely on this as well. As far as we are concerned, we feel that the court retains those powers.

The Chair: I do not think we have any more questions for you. Does the Minister want to add anything at this stage as a witness?

Lord Bellamy: I think not. Thank you very much.

The Chair: Professor Green, do you want to add anything at this stage?

Professor Sarah Green: No, thank you.

The Chair: We have reserved certain matters to come back to. There may be others we will also ask your assistance on and we will work out the best way of doing that. May I, on the committee's behalf, express our gratitude to you, and equally to Lord Bellamy as the Minister, for the care and the very considerable skill and fluency with which you have answered all our many questions? We are very grateful to you. Thank you very much. The committee will now resolve itself into private session and will be in touch with you in due course, Professor Green, and others. Thank you very much.